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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 263.

SAMUEL E. GIDNEY, PLAINTIFF IN ERROR,

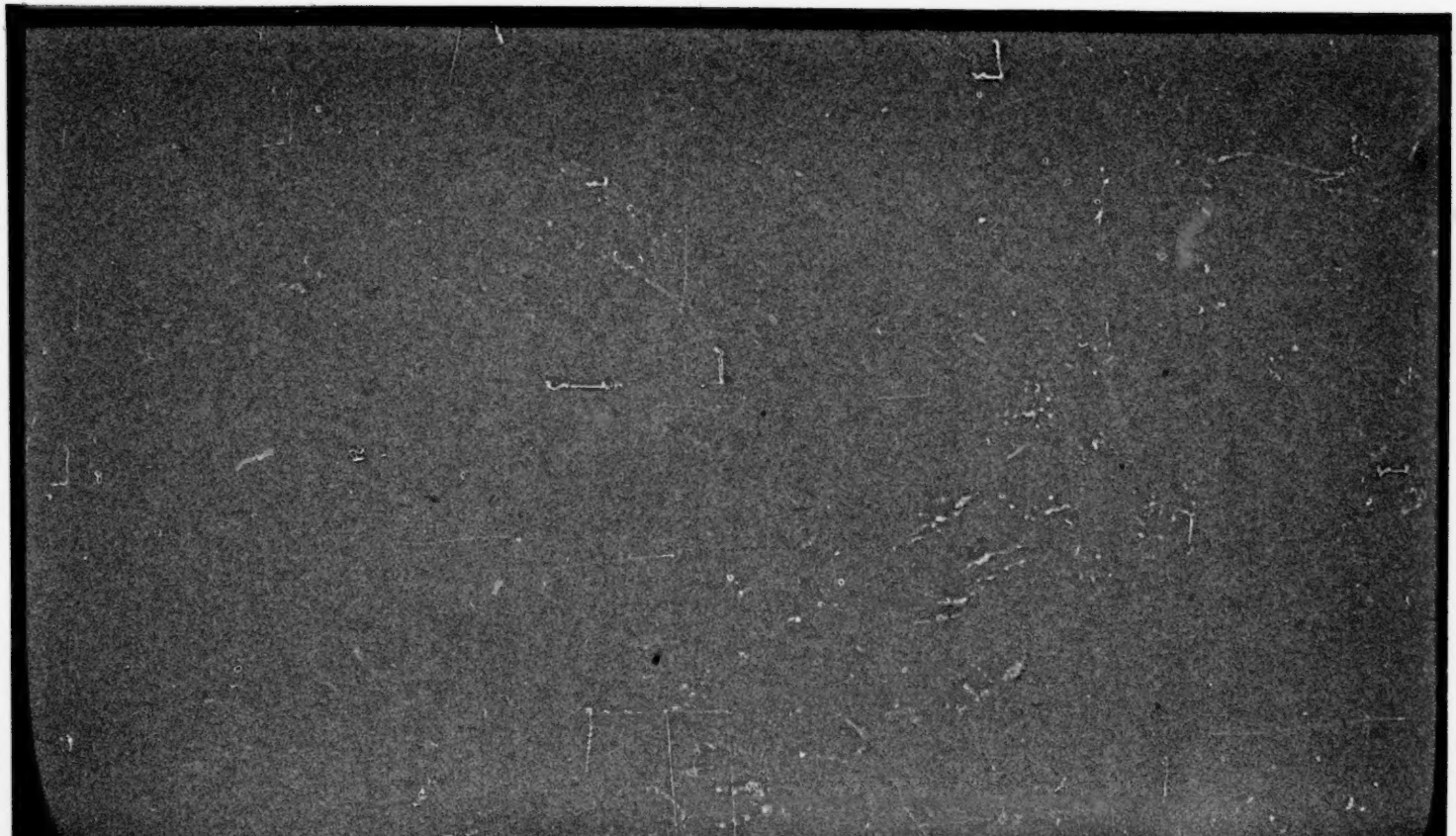
vs.

SIDNEY C. CHAPPEL AND J. C. SCULLY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

FILED OCTOBER 19, 1915.

(24,403)



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1 Filed Sep. 29, 1914. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 6501.

SAMUEL E. GIDNEY, Plaintiff in Error,

vs.

SYDNEY C. CHAPPLE, J. C. SCULLY, CHARITY DOBBS, and B. F. Silks, as Executor of the Estate of Sullivan Thorn, Deceased, Defendants in Error.

Notice.

To B. F. Silks, as Executor of Sullivan Thorn, Deceased:

This is to notify you, that the Supreme Court of the State of Oklahoma has affirmed the judgment of the Superior Court of Muskogee County, State of Oklahoma, in the above entitled case, cancelling the Will of Sarah Rawlings, deceased, and that same will become final unless writ of error is sued out and prosecuted to the Supreme Court of the United States. This, I propose to do, and you are hereby notified to join me in said writ of error within five (5) days, after receipt hereof, or to neglect so to do within said time will be construed as a declination on your part to join in said writ of error.

Dated this 9th day of September, 1914.

SAMUEL E. GIDNEY.

1a No. 1780.

Receipt for Registered Mail.

Postmark: Muskogee, Okla., Sep. 9, 1914, Registered.

This receipt represents a letter or parcel registered at the post office indicated by postmark. Inquiries concerning registered mail should state the number of the article, date of its registration, and the names and addresses of sender and addressee. The sender of the article represented by this receipt should write the name and address of the addressee on the reverse side.

Return receipt demanded.

POSTMASTER,
Per P.

1 class postage prepaid.

[Endorsed:] Notice to B. F. Silks, Ex. Sullivan Thorn, to join in Writ of Error to U. S. Supreme Ct.

Post Office Department.
Official Business.

Penalty for Private Use to Avoid Payment of Postage, $300.

Postmark of Delivering Office

Calhoun,
Sep. 14, 5 P. M., 1914,
Ga.

and Date of Delivery.

Original Reg. No. 1780.

Return to:

S. E. GIDNEY.
(Name of sender.)

Street and Number, or Post Office Box, —— ——,

MUSKOGEE, OKLAHOMA.

This card must be neatly and correctly made up and addressed at the post office where the article is registered. The postmaster who delivers the registered article must see that this card is properly signed, legibly postmarked, and mailed to the sender, without envelope or postage.
R. 9/16/14. S. E. G.

Form 1548.

Registry Return Receipt.

Calhoun,
Sep. 14, 5 P. M., 1914,
Ga.

Received from the postmaster registered article, the original number of which appears on the reverse side of this card.
Date of delivery....., 19..
(To be filled in by person signing receipt.)

B. F. SILKS.
(Signature or name of addressee.)

When delivery is made to an agent of the addressee, both addressee's name and agent's signature must appear in this receipt.

——— ———,
(Signature of addressee's agent.)

A registered article must not be delivered to anyone but the addressee or the person in whose care it is addressed, except upon addressee's written order or a written order from the sender transmitted by the mailing postmaster and duly verified.
When the above receipt has been properly signed, it must be postmarked with the name of delivering office and actual date of delivery and mailed to its address, without envelope or postage.

2 STATE OF OKLAHOMA,
County of Muskogee, ss:

I, Samuel E. Gidney, of lawful age, being first duly sworn, say: That on the 9th day of September, 1914, I sent by registered mail to B. F. Silks named in said Notice a Duplicate and original of the above and foregoing Notice addressed to him, and the same was received by B. F. Silks aforesaid on the 14th day of September, 1914, but he has so far neglected and failed to join me in said writ of error, or to notify me that he would not so join therein.

SAMUEL E. GIDNEY.

Subscribed and sworn to before me this 25th day of September, 1914.

[Seal Miss Anthem York, Notary Public, Muskogee County, Okla.]

ANTHEM YORK,
Notary Public.

My commission expires, September 9th, 1918.

3 Filed Sep. 29, 1914. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 6501.

SAMUEL E. GIDNEY, Plaintiff in Error,
vs.
SIDNEY C. CHAPPEL, J. C. SCULLY, CHARITY DOBBS, and B. F. Silks, as Executor of the Estate of Sullivan Thorne, Deceased, Defendants in Error.

To the Honorable Matthew Kane, Chief Justice, and the Associate Justices of the Supreme Court of the State of Oklahoma:

Whereas in the above entitled case this Court has recently affirmed the judgment of the Superior Court of Muskogee County, State of Oklahoma, and Whereas the Plaintiff in Error, Samuel E. Gidney, purposes to carry this case to the Supreme Court of the United States by a writ of error, and has made application to me to join him in said writ of error,—I hereby decline to join in said writ of error, or to join in an appeal of said case to the Supreme Court of the United States, and request that an order be made in this case directing and permitting said Gidney to prosecute said appeal and sue out a writ of error in the above entitled case without me joining therein.

CHARITY DOBBS.

4 Filed Oct. 1, 1914. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

No. —.

SAMUEL E. GIDNEY, Plaintiff in Error,
vs.
SIDNEY C. CHAPPEL, J. C. SCULLY, CHARITY DOBBS, and B. F. Silks, as Executor of the Estate of Sullivan Thorn, Deceased, Defendants in Error.

Citation to Defendants in Error.

The United States of America to Sidney C. Chappel and J. C. Scully, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington, D. C., not to exceed thirty days from and after the date of this citation, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of Oklahoma, wherein Samuel E. Gidney is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in *their* behalf.

5 Witness the Honorable Matthew J. Kane, Chief Justice of the Supreme Court of Oklahoma, this the 29th day of September, 1914.

M. J. KANE,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL, *Clerk,*
By JESSIE PARDOE, *Deputy.*

We hereby acknowledge due service of the within citation this the 30 day of September, 1914.

YANCEY LEWIS,
N. B. MAXEY,
CHAS. F. RUNYAN,
Attorneys for the Defendants in Error.

6 Filed Sep. 29, 1914. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

No. —.

SAMUEL E. GIDNEY, Plaintiff in Error,

vs.

SIDNEY C. CHAPPEL, J. C. SCULLY, CHARITY DOBBS, and B. F. Silks, as Executor of the Estate of Sullivan Thorn, Deceased, Defendants in Error.

Petition for Writ of Error.

To the Honorable Matthew J. Kane, Chief Justice of the Supreme Court of the State of Oklahoma:

The petition of Samuel E. Gidney respectfully shows that heretofore, to-wit: On the 8th day of December, 1913, there was tried in the Superior Court of Muskogee County, in the State of Oklahoma, a case in which Sidney C. Chappel and J. C. Scully were plaintiffs, and your petitioner and Charity Dobbs and Sullivan Thorn were defendants. The complaint of the plaintiffs in said case was for the purpose of setting aside a will executed by Sarah Rawlings on the 23rd day of October 1905 and the codicil thereto of April 13th, 1906, heretofore offered for probate in the United States Court for the Western District of the Indian Territory at Muskogee on the third day of July 1906. Upon the trial of
7 said cause in said Court your petitioner demurred to plaintiffs' third amended complaint,—First:—Because the same did not state facts sufficient to constitute an equitable cause of action. Second:—Because the United States Court for the Western District of the Indian Territory in which said suit was originally instituted, could only try the issues involved in said third amended complaint, and particularly in the original complaint on its probate side, and did not have jurisdiction to try and could not try the issues involved in said complaint on the equity side of its docket, and because the Superior Court of Muskogee County, to which said suit was transferred from the District Court of Muskogee County in the State of Oklahoma, which tried said cause, did not have jurisdiction to try said case nor to consider the issues involved in said complaint on the equity side of its docket, which said demurrer was over-ruled by said Court; and thereupon there was a judgment in said case by default against the defendants other than the petitioner, and a judgment on the demurrer in favor of the plaintiffs against this petitioner whereby it was decreed that said will and codicil was invalid, null and void, and not the will of said Sarah Rawlings; that the said Sarah Rawlings died intestate and that Samuel E. Gidney, Charity Dobbs and Sullivan Thorn take nothing by said purported will and that probate of said will and codicil had in the United States District Court for the Western District of Indian Territory at

Muskogee be and the same was set aside, vacated and held for naught, and it was ordered and adjudged that your petitioner pay all costs in said case and that execution issue therefor.

Your petitioner shows that each of said grounds raised and presented the Federal questions in said case, namely:

8 First. Whether Section 5509 of Chapter 155, entitled "Wills and Testaments" as published in the volume known as Mansfield's Digest of the State of Arkansas, and adopted and put in force in the Indian Territory by Section 31 by the Act of Congress of May 2nd, 1890 (Chapter 182, 26 U. S. Stats. 81) was locally inapplicable to conditions in the Indian Territory and was extended and put in force by said Act of Congress in the Indian Territory.

Second. Whether by said Act of Congress of May 2nd, 1890, Chapter 182—26 Stat. 81—Congress intended to extend over and put in force in the Indian Territory all the provisions that are found in the several chapters of Mansfield's Digest, which are designated in Sec. 31 of said Act of Congress by subject and chapter number, if not locally inapplicable or in conflict with said Act of Congress, or with any law of Congress relating to the subjects especially mentioned in said section, and whether Congress intended or not to make the extension or non-extension of said laws to depend upon the question of whether they were in force in Arkansas at the close of the session of the General Assembly of that State in 1883.

Third. Whether or not Sections 6525 and 6526 of Mansfield's Digest were adopted and put in force in the Indian Territory by said Act of Congress of May 2nd, 1890, above referred to.

Fourth. Whether or not the Superior Court of Muskogee County and State of Oklahoma was the legal successor under the Acts of Congress to the probate side of the United States Court for the Western District of the Indian Territory at Muskogee, the last named Court entertaining the jurisdiction of wills on its probate side

9 and not sitting in chancery, and the Superior Court having no probate side or probate jurisdiction under the law.

That said case was carried to the Supreme Court of the State by a petition in error, which, with its accompanying record, came on to be heard and was argued in said Supreme Court of the State of Oklahoma and on the 11th day of August, 1914, the Supreme Court rendered its final judgment thereon affirming the judgment of the Court below.

Your petitioner further shows that the said judgment of said Supreme Court was and is the final judgment in the highest Court of the State of Oklahoma in which a decision in said State could or can be had.

Your petitioner further shows that a Federal question was made in said case as hereinbefore set out, and as will more in detail appear from the assignment of errors which is filed with this petition, and that said judgment of the Supreme Court was repugnant to and in conflict with the laws of the United States, and that said judgment of the Supreme Court deprived this petitioner of his property without due process of law and violated the rights and immunities granted to him under the Constitution of the United States, and that a de-

cision of the said Federal question was necessary to the judgment rendered.

Your petitioner further shows that his co-defendant, Charity Dobbs, upon notice, declined to join with him in the prosecution of this writ of error, and that her declination is in writing and is hereby referred to and made a part of the record in this case; that notice was duly sent to B. F. Silks, as executor of Sullivan Thorn, deceased, to join in said appeal, giving him five (5) days after the receipt of said notice to join in or decline to join in said appeal. That said notice was mailed on the ninth day of September and was received by said B. F. Silks on the 14th of September, 1914; that no reply has been heard from him; which said notice, together with the registry receipts and the affidavit of your petitioner are hereby referred to and made a part of this petition.

Your petition therefore is prosecuting this appeal alone, and asks that he be permitted so to do.

Wherefore, your petitioner presents herewith an exemplified transcript of the record of the Supreme Court of the State of Oklahoma in said case, and prays that a writ of error to said Supreme Court be allowed; that citation be granted and signed; that the bond herewith presented be approved, and that upon compliance with the terms of the statute in such cases made and provided, said bond and writ of error may operate as supersedeas; that the errors complained of may be reviewed in the Supreme Court of the United States and the judgment aforesaid of said Supreme Court of Oklahoma be reversed.

WILLIAM T. HUTCHINGS,
Attorney for the Petitioner.

The writ of error as prayed for in the foregoing petition is hereby allowed this the 29th day of September, 1914,—the writ of error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of Five Thousand ($5,000) Dollars.

Dated at Oklahoma City, State of Oklahoma, this the 29th day of September, 1914.

[Seal Supreme Court, State of Oklahoma.]

M. J. KANE,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:

W. H. L. CAMPBELL, *Clerk,*
By JESSIE PARDOE, *Deputy.*

Filed Sep. 29, 1914. W. H. L. Campbell, Clerk.

11 Filed Sep. 29, 1914. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

No. —.

SAMUEL E. GIDNEY, Plaintiff in Error,
vs.
SIDNEY C. CHAPPEL, J. C. SCULLY, CHARITY DOBBS, and B. F. Silks, as Executor of the Estate of Sullivan Thorn, Deceased, Defendants in Error.

Assignments of Errors.

Now comes Samuel E. Gidney, the plaintiff in error, and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Oklahoma in the above entitled matter, there is manifest error in this, to-wit:—

First. In holding that neither Section 6523 of Chapter 155, Mansfield's Digest of Arkansas, nor Section 6525 of the same chapter were available to the original plaintiffs in this action, and that they were put in force in the Indian Territory by the Act of May 2nd, 1890 (26 Stat. L. 81) and were embraced within the body of law extended and put in force in the Indian Territory, by which said holding the plaintiff in error is deprived of property without due
12 process of law, and his rights, privileges and immunities secured to him by the laws of the United States.

Second. The Court erred in holding that Section 6509 of Mansfield's Digest of the Laws of Arkansas of 1884 was locally inapplicable and was not extended to and put in force in the Indian Territory by the Act of Congress of May the 2nd, 1890.

Third. The Court further erred in holding that the United States Court for the Western District of the Indian Territory had jurisdiction under Section 6523 of Mansfield's Digest of the State of Arkansas, to try said cause, which said Section is as follows:—

"Any person interested who, at the time of the final decision in the circuit court, resided out of this state, and was proceeded against by order of appearance only, without actual appearance or being personally served with process, may, within three years after such final decision in the circuit court, by a bill in chancery, impeach the decision and have a retrial of the question of probate; and either party shall be entitled to a jury for the trial thereof. An infant, not a party, shall not be barred of such proceedings in chancery until twelve months after attaining full age."

Fourth. The Court further erred in holding that said United States Court for the Western District of the Indian Territory had jurisdiction to try this cause under Section 6525 of Mansfield's Digest of Arkansas, under the Act of Congress of May 2nd, 1890 (26 Stat. L. 81), which said section is as follows:—

"If any person interested in the probate of any will shall appear within five years after the probate or rejection thereof, and by peti-

tion to the circuit court of the county in which such will was established or rejected, pray to have any such will rejected, if previously established, or proven, if previously rejected by the court of probate, it shall be the duty of the circuit court to direct an issue to try the validity of such will, which issue shall in all cases be tried by a jury."

13 Fifth. Said Court erred in holding that Section 31 of the Act of May 2nd, 1890 (26 Stat. L. 81), which puts in force certain general laws of the State of Arkansas at the close of the session of the General Assembly of that State of 1883, as published in 1884 in the volume known as Mansfield's Digest of the Statutes of Arkansas, was merely descriptive of the specific body of laws which Congress intended to become the laws of the Indian Territory, but that it was not the intention to make such adoption depend upon whether the laws described were actually in force in the State of Arkansas at the close of the session of the Legislature of 1883. That the interpretation so placed upon said statute is contrary to and in violation of and in contravention of said statute, and deprives the plaintiff in error of his property without due process of law, and deprives him of rights and privileges and immunities secured to him by the Constitution and laws of the United States.

Plaintiff in error says that said judgment of said Supreme Court of Oklahoma is repugnant to and in conflict with the laws of the United States, and especially Section 31 of the Act of May 2nd, 1890 (26 Stat. L. 81).

Sixth. The Court erred in holding that under the laws of the United States the Superior Court of Muskogee County had jurisdiction to cancel and set aside the will in question and particularly under the Act of May 2nd, 1890 (26 Stat. L. 81).

Wherefore, Samuel E. Gidney, plaintiff in error, prays that the judgment and decision aforesaid may be reversed, annulled and altogether held for naught, and that he may be restored to all things

14 which he has lost by the action because of such judgment and decision.

WILLIAM T. HUTCHINGS,
Attorney for Plaintiff in Error.

15 Filed Sep. 29 1914. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

No. —.

SAMUEL E. GIDNEY, Plaintiff in Error,

vs.

SIDNEY C. CHAPPEL, J. C. SCULLY, CHARITY DOBBS, and B. F. Silks, as Executor of the Estate of Sullivan Thorn, Deceased, Defendants in Error.

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and the proceedings, as also in the rendition of the judgment, of a plea which is in said Supreme Court of the State of Oklahoma, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Sidney C. Chappel and J. C. Scully, against Samuel E. Gidney, Charity Dobbs, and Sullivan Thorn, wherein was drawn in question the construction of an Act of Congress of May the 2nd, 1890 (26 Stat. L. 81) and particularly of Sec. 31 thereof, and the decision was against the title, right and privilege or exemption specially set up and claimed under
16 said statute and manifest error hath happened to great damage of the said Samuel E. Gidney as by his complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid, in this behalf do command you, if judgment be therein given, then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 29th day of October, 1914, in the said Supreme Court, to be then and there held; That the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court this the twenty-ninth day of September, 1914.

Issued at office in the City of Oklahoma, State of Oklahoma with the seal of the District Court in and for the Western District of the State of Oklahoma, date as aforesaid.

[Seal of the United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE,
Clerk of the United States District Court in and for the Western District of the State of Oklahoma.

Allowed by
M. J. KANE,
Chief Justice of the Supreme Court of the State of Oklahoma.

17 In the Supreme Court of the State of Oklahoma.

No. —.

SAMUEL E. GIDNEY, Plaintiff in Error,
vs.
SIDNEY C. CHAPPEL, J. C. SCULLY, CHARITY DOBBS, and B. F. SILKS, as Executor of the Estate of Sullivan Thorn, Deceased, Defendants in Error.

Certification.

I, W. H. L. Campbell, Clerk of the Supreme Court of Oklahoma, do hereby certify that on the 29th day of September, 1914, a copy of the foregoing Writ of Error for the defendants in Error was lodged in my office at Oklahoma City, Oklahoma.

Witness my hand and the seal of said Court this the 29th day of September, 1914.

[Seal of the United States District Court, Western District of Oklahoma.]
[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL.
Clerk of the Supreme Court of the State of Oklahoma.
By JESSIE PARDOE, *Deputy.*

18 (Filed Sep. 29, 1914. W. H. L. Campbell, Clerk.)

In the Supreme Court of the State of Oklahoma.

No. 6501.

SAMUEL E. GIDNEY, Plaintiff in Error,
vs.
SIDNEY C. CHAPPEL, J. C. SCULLY, CHARITY DOBBS, and B. F. SILKS, as Executor of the Estate of Sullivan Thorn, Deceased, Defendants in Error.

Know all men by these presents: That we, Samuel E. Gidney, as principal and Southern Surety Company, a corporation, as surety, both of the County of Muskogee, State of Oklahoma, are held and firmly bound unto Sidney C. Chappel and J. C. Scully in the sum of five thousand ($5,000) dollars, to be paid to the said obligees, their successors, representatives and assigns, to the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this the 28th day of September, A. D., 1914.

Whereas the above named plaintiff in error has prosecuted a writ

of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Oklahoma.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute his said writ of error and answer all costs and damages if he shall fail to make
19 good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

SAMUEL E. GIDNEY, *Principal.*
SOUTHERN SURETY COMPANY, *Surety,*
By O. A. WELLS, *Its Vice-President.*

I hereby approve the foregoing bond and sureties this the twenty-ninth day of September, Nineteen Hundred and Fourteen.

M. J. KANE,
Chief Justice of the Supreme Court of the State of Oklahoma.

Endorsed: No. —. In the Supreme Court of the State of Oklahoma. Samuel E. Gidney, Pltf. in Error, vs. Sidney C. Chappel, J. C. Scully, et al., Def't's in Error. Bond. William T. Hutchings, Muskogee, Att'y for Plaintiff in Error.

20 STATE OF OKLAHOMA,
County of Muskogee:

Filed Jun- 6, 1914. Robert Toomer, Clerk Superior Court.

In the Superior Court of the State of Oklahoma.

No. 6501.

SAMUEL E. GIDNEY, Plaintiff in Error,
vs.
SYDNEY C. CHAPPLE, J. C. SCULLY, CHARITY DOBBS, and B. F. SILKS, as Executor of the Estate of Sullivan Thorn, Deceased, Defendants in Error.

Petition in Error.

Filed Jun- 8, 1914. W. H. L. Campbell, Clerk.

The said Samuel E. Gidney, Plaintiff in error, complains of said defendants in error for that the said Sydney C. Chapple and J. C. Scully, 8th day of December, 1913, at the — Term, 1913, of the Superior Court of Muskogee County, State of Oklahoma, recovered a judgment, by the consideration of said Court against the said Samuel E. Gidney, Charity Dobbs and Sullivan Thorn; the latter being at the time dead, said judgment was thereafter revived in the name of B. F. Silks, as executor of the estate of said Sullivan Thorn, in a certain action then pending in said Court wherein the said Sydney C. Chapple and J. C. Scully were plaintiffs and the

said Samuel E. Gidney, Charity Dobbs and Sullivan Thorn were defendants. A certified transcript of the record of said case is hereto attached, marked Exhibit A, and made a part of this petition in error.

21 And the said Samuel E. Gidney avers that there is error in the said record and proceedings in this, towit:

First. That said Court erred in over-ruling the motion of the plaintiff in error for a new trial.

Second. That said Court erred in over-ruling the demurrer of Plaintiff in Error to the Third Amended petition.

Third. That said Court erred in rendering judgment against the plaintiff in error.

Wherefore, the plaintiff in error prays that said judgment, so rendered, may be reversed, set aside and held for naught, and that a judgment may be rendered in favor of the plaintiff in error, and that the plaintiff in error may be restored to all rights that he has lost by the rendition of such judgment, and for such other relief as to the Court may seem just.

SAMUEL E. GIDNEY,
Plaintiff in Error,
By WILLIAM T. HUTCHINGS,
Attorney for Plaintiff in Error.

22 STATE OF OKLAHOMA,
County of Muskogee:

Filed Jun- 6, 1914. Robert Toomer, Clerk Superior Court.

In the Superior Court in and for Muskogee County, State of Oklahoma.

No. 1173.

SYDNEY C. CHAPPLE and J. C. SCULLY, Plaintiffs,
vs.
SAMUEL E. GIDNEY, CHARITY DOBBS and SULLIVAN THORN, Defendants.

Filed Jun- 8, 1914. W. H. L. Campbell, Clerk.

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Transcript.

In the District Court, Third Judicial District, Muskogee County, Oklahoma.

SYDNEY C. CHAPPLE, Plaintiff,
vs.
SAMUEL E. GIDNEY, CHARITY DOBBS and SULLIVAN THORN, **Defendants.**

Be it remembered, that on the 18th day of August, 1906, the plaintiff commenced this action by filing in the office of the Clerk of the United States Court for the Western District of the Indian Territory at Muskogee, his complaint in this case, which said original complaint is attached hereto and made a part of this transcript, and is in words and figures as follows, to wit:

26 United States Court for the Western Judicial District, Indian Territory, at Muskogee.

No. —, Equity.

SIDNEY C. CHAPPLE, Plaintiff,
vs.
SAMUEL E. GIDNEY, CHARITY DOBBS, SULLIVAN THORN, Defendants.

Complaint in Equity to Set Aside Will.

To the Honorable William R. Lawrence, Judge of the United States Court for the Western District of the Indian Territory, at Muskogee, in Chancery Sitting:

Your Petitioner, Sidney C. Chapple, respectfully represents unto your Honor that he is a citizen of the United States and a resident of the Western District of the Indian Territory, and that the defendants, Samuel E. Gidney and Charity Dobbs, and Sullivan Thorn are citizens of the United States and the said defendants Samuel E. Gidney and Charity Dobbs reside in the Western District of the Indian Territory and the defendant Sullivan Thorn resides at Senoraville, Georgia, and that the nearest place of holding Court to the defendants Samuel E. Gidney and Charity Dobbs is at Muskogee, Indian Territory and that the subject matter of this suit is pending in the Probate Court of the Western District of the Indian Territory, at Muskogee.

Your petitioner further represents unto your Honor that one Sarah Rawlings, formerly Sarah Chapple, the mother of your petitioner, late of the town of Haskell, Western District, Indian Territory, but now deceased, on or about the twenty third day of

October, 1905, executed a certain instrument in writting,
27 purporting to be her last will and testament; and thereafterwards, to-wit, on the sixteenth day of June, 1906, departed this life, leaving your petitioner her only child and sole heir at law.

Your petitioner further represents that the said Sarah Rawlings under and by the said instrument of writing so purporting to be her last will and testament professedly bequeathes all her estate, both real and personal, as follows:

To Sidney Chapple, who is your petitioner, five hundred dollars, with any debt which he may be owing to the said Sarah Rawlings at the time of her death. To Samuel E. Gidney, who is one of the defendants herein, and his heirs, all of the rest, residue, and remainder of her estate, real, personal and mixed, of whatsoever kind, and wheresoever situated, whereof she may die *siezed* or possessed, or have an interest in at the time of her death, which property consisted of real estate, banking stock, cash on hand and personal property of the value of thirty thousand dollars, or more; and thereafter to wit, on the thirteenth day of April, 1906, the said Sarah Rawlings executed an instrument in writing purporting to be a codicil to her aforesaid purported will and under and by said instrument of writing so purporting to be a codicil to her purported will aforesaid, professedly bequeathes to Charity Dobbs the sum of fifty dollars and to her brother, Sullivan Thorn, of Senoraville, Georgia, all of her dresses, cloaks, clothing and such wearing apparel, as will more fully appear from the said instrument in writing when produced in Court and from a copy of same hereto attached, marked Exhibit "A" and is made a part of this complaint.

Your petitioner further represents that on the third day of July, 1906, the said instrument of writing purporting to be the last will and testament of the said Sarah Rawlings was exhibited to the United States Court for the Western District of the Indian Territory, sitting in Probate, for probate, and the same was then
28 and there probated and letters testamentary thereon were granted to the defendant, Samuel E. Gidney, the person named in said instrument of writing to act as executor of the said purported will, and the said Samuel E. Gidney then and there duly qualified and took upon himself the burden of sole executor of the said supposed will of the said Sarah Rawlings, deceased.

Your petitioner further represents that the said Sarah Rawlings, at the time of the execution of said instrument in writing purporting to be her last will and testament was not of sound and disposing mind and memory, but on the contrary she was so week and feeble from ill-health and her mind and memory was so impaired as to render her wholly incapable of making any just and proper disposition of her estate.

Your petitioner further represents that the defendant, Samuel E. Gidney, the princip*le* legatee in said pretended will, used and exercised many undue arts and fraudulent practices and resorted to falsehoods and misrepresentations to induce the said Sarah Rawlings to execute the said instrument of writing and the said Sarah

Rawlings in executing the same was in fact under improper restraint and undue influence from the arts and fraudulent practices of the defendant Samuel E. Gidney; and

Your petitioner particularly represents that the defendant, Samuel E. Gidney, in order to induce the said Sarah Rawlings to execute the said instrument in writing took advantage of his confidential position as attorney and legal adviser of the said Sarah Rawlings and poisoned her mind and alienated her affections from your petitioner and other relatives by false statements as to what he was doing for her and how little your petitioner and other relatives cared for her and that he was in fact her only true friend and in her weak and emaciated condition physically and on account of her mental condition, her mind and memory being
29 so impaired as to render her susceptible of his arts and fraudulent practices, the said defendant, Samuel E. Gidney, obtained such control over the mind of said Sarah Rawlings as to render her incapacitated to know what she was doing at the time she executed the said purported will and by reason of the undue influence exercised over her by the said Samuel E. Gidney, who was and had been for a long time prior thereto her lawyer and confidential adviser, she was so much under his arts and influence at the time of the execution of the said instrument of writing, purporting to be her last will and testament, as to be incapable of doing anything other than that which he advised, and but for such undue influence over her by the said Samuel E. Gidney she would not have executed the instrument purporting to be her last will and testament.

Your petitioner further represents that said paper which was as aforesaid admitted to probate by said United States Court for the Western District of the Indian Territory is not the last will and testament of the said Sarah Rawlings.

Wherefore, Plaintiff prays that the validity of said paper writing be determined in this action and that the same be adjudged invalid and void and that the said Sarah Rawlings, died intestate and for such other and further relief as may be just with the costs of this action:

That an issue be formed devisavit vel non as to the validity of the said will, to be tried by a jury and that judgment be rendered setting aside the probating of said will and declaring the will void and of no effect.

That the said Samuel E. Gidney, executor under said pretended will, be required to account for all of that portion of said estate which may have come into his hands from any source whatever and that he be required to pay to the plaintiff herein any money that may have come into his hands as executor of said estate and for
30 all such other and further relief as to the court may seem proper.

W. F. SCHUERMYER,
RAYMOND, MAXEY & RUNYAN,
Attorneys for Petitioner.

N. B. Maxey, being duly sworn, states that he is one of the attorneys in the above entitled cause for the plaintiff, that the plaintiff is absent from the Indian Territory and cannot verify this complaint, and that he, as attorney verifies the same, on his behalf and states that he has read over the foregoing complaint and believes the facts stated therein are true.

N. B. MAXEY.

Subscribed and sworn to before me this 18th day of August, 1906.

[SEAL.] ROSE M. SIMPSON,
Notary Public.

31 PLAINTIFF'S EXHIBIT "A."

Will of Sarah Rawlings.

UNITED STATES OF AMERICA,
Indian Territory, Western District:

I, Sarah Rawlings, formerly Sarah Craig, of Haskell, Western District aforesaid, being of sound and disposing mind and memory, but sensible of the uncertainty of life, do hereby make, publish and declare the following to be my last will and testament, hereby revoking and declaring utterly void all other and former wills and testament- by me, at any time, made:

First: My executor, hereinafter named, shall give my body a decent burial in my lot in Mount Holly Cemetery at Little Rock, Arkansas, beside a former husband of mine, Edward Chapple; the said lot having been deeded to me in my former name, Sarah Chapple; and shall erect at my grave a good monument, placing thereon my name the date of my death and the date of my birth, which is May 10, 1865; and pay all funeral expenses, together with all my just debts out of the first money which may come into his hands belonging to my estate; the said funeral expenses and monument to be at the discretion of my executor; and he shall pay himself whatever expenses he shall be put to in looking after the same, whether in traveling expenses or otherwise.

Second. I give and bequeath to my only child, Sidney Chapple, Five Hundred ($500.00) Dollars, together with any debt which at the time of my decease shall be owing from him to me, together with any interest due thereon; the said sum of Five Hundred ($500.00) Dollars, to be paid my aforesaid son by the executor named herein at such time as in the discretion of my said executor he may feel that the condition of my said estate will warrant the same; but if my said son die before me, or does not apply for the legacy herein within twelve months after my death, or does not in the said time accept the same in full of all interest and claim in my estate, then in either event, I give and bequeath the said legacy intended for him
32 to my trusted friend, Samuel E. Gidney, of Muskogee, Indian Territory, his heirs, executors, administrators and assigns, absolutely forever. My said son has been the recipient of a consid-

erable amount of money from me, and I have endeavored to win his love and affection and care, but he has signally failed to perform his filial duty towards me, and has been neglectful, wild and reckless, and has brought added sorrow to my life, and I pray that he may yet see the error of his ways and be saved under the grace of God and yet be a blessing.

Third. Whereas, I have not heard from an only brother of mine for ten (10) years or more, and have not heard from any of my relatives for many years:

Whereas, neither he nor they have ever manifested any interest in or care for me, and are strangers to me, and I do not desire that they nor their heirs receive anything from my estate:

And Whereas, Samuel E. Gidney, of Muskogee, Indian Territory, has been to me a true and trusted friend, and in many ways has contributed to my relief and comfort.

And Whereas, it is my desire that *they* shall be at least partially compensated therefor, I therefore, do hereby give, devise, bequeath all the rest, residue and remainder of my estate, real, personal and mixed and whatsoever kind, *of* wheresoever situated whereof I may be seized or possessed, or I might in any manner be entitled, or in which I may be interested at the time of my death, unto my worthy and trusted friend Samuel E. Gidney, and to his heirs, executors, administrators and assigns, absolutely forever, together with all of the hereditaments and appurtenances thereunto belonging or in any wise appertaining:

To Have and To Hold, the same to the said Samuel E. Gidney, his heirs and assigns forever. And if the said Samuel E. Gidney, dies before me, I give, bequeath and devise the legacies and devices intended for him to his heirs, executors, administrators or assigns, according as the same may be, real or personal property.

33 Fourth: I hereby make, nominate and appoint and constitute Samuel E. Gidney, of the City of Muskogee, Indian Territory, Western District, my lawful executor to all intents and purposes, to execute this my last will and testament according to the true intent and meaning of the same, and every part and clause thereof.

Fifth. In case of the death of my executor or of his resignation, incapacity or refusal to qualify and act, I hereby make, constitute, nominate and appoint Benjamin Martin, Jr., of the City of Muskogee, Western District, Indian Territory, my lawful executor to all intents and purposes, to execute this my last will and testament, according to the true intent and meaning of the same.

In Witness Whereof, I, the said Sarah Rawlings, formerly Sarah Craig, have to this my last will and testament, consisting of three pages, subscribed my name and set my seal in the Western District, Indian Territory, on this 23rd day of October, 1905.

SARAH RAWLINGS. [SEAL.]

The foregoing instrument consisting of three pages, was on this the 23rd day of October, 1905, signed, sealed, published and declared by the Testatrix, Sarah Rawlings, formerly Sarah Craig, to be her

last will and testament, in the presence of each of us the undersigned each of whom is over the age of twenty-one years and who thereupon at her request and in her presence and in the presence of each other, have hereunto subscribed our names as attesting witness- thereof, the day and year last above written.

Name: FRED V. MADDIN,
P. O. Muskogee, I. T.
Name: W. M. CHANDLER,
P. O. Muskogee, I. T.
Name: GEORGE McMILLAN,
P. O. Muskogee, I. T.

Signed in Maddin Building, Room 18, Muskogee, I. T.

34 *Codicil to the Will of Sarah Rawlings.*

I, Sarah Rawlings, of Haskell, Indian Territory, having made my last will and testament bearing date of October 23rd, 1905, the same having been witnessed by Fred V. Maddin, George McMillan and W. M. Chandler, do now make this codicil to be taken as a part of the same.

First. I hereby ratify and confirm said will in every respect, save so far as any part of it is inconsistent with this codicil.

Second. I give and bequeath to Mrs. Charity Dobbs, of Haskell, Indian Territory, who has been a kind nurse to me, the sum of Fifty Dollars ($50.00).

Third. I have recently heard from my brother Sullivan Thorn, of Senoraville, Georgia, and in case he or any one for him in his family will accept the same, I give, and bequeath to my said brother, Sullivan Thorn, all of my dresses, cloaks, clothing and such wearing apparel.

In Witness Whereof, I, Sarah Rawlings, have to this codicil to my last will and testament, subscribed my name and set my seal on this 13th day of April, 1906.

Endorsed on the back thereof appears the following: No. 6816, Sydney C. Chapple, Plaintiff vs. Samuel E. Gidney, et al. Defendants. Complaint in Equity to set Aside Will. Western District, Ind. Ter. Filed Aug. 18, 1906, R. P. Harrison, Clerk of U. S. Courts.

35 And on said 18th day of August, 1906, there was issued out of the office of the Clerk of the United States Court of said Western District of the Indian Territory at Muskogee —, directed to the Marshal of said District commanding him to notify the defendants of the filing and pendency of this action, and of the answer day thereto; said summons together with the Marshal's return endorsed thereon is attached hereto and made a part of this transcript, and is in words and figures as follows to wit:

Summons in Equity.

UNITED STATES OF AMERICA,
Indian Territory, Western District:

The President of the United States of America to the Marshal for the Western District, Indian Territory:

You are commanded to summon Samuel E. Gidney, Charity Dobbs and Sullivan Thorn to answer in twenty days after the service of this Summons upon them, a complaint in equity filed against them in the United States Court for the Western District, Indian Territory, at Muskogee by Sydney C. Chapple, and warn them that upon their failure to answer, the complaint will be taken for confessed, and you will make due return of this Summons on the first day of the Next October Term of said Court.

Witness, the Honorable William R. Lawrence, Judge of said Court, and the seal thereof, at Muskogee, Indian Territory, this 18th day of August A. D. 1906.

[SEAL.]

R. P. HARRISON, *Clerk,*
By D. F. DICKEY, *Deputy.*

36 *Marshal's Return.*

UNITED STATES OF AMERICA,
Indian Territory, Western District, ss:

I received this Summons in Equity at Muskogee, Indian Territory, on the 20th day of August A. D. 1906 at 2:45 o'clock P. M. and served the same as follows:

By delivering a true copy thereof personally to the within named defendant, Charity Dobbs, at Haskell, Western District of Indian Territory, this 20th day of August A. D. 1906 at 7:15 o'clock P. M.

By delivering a true copy thereof personally to the within named defendant, Samuel E. Gidney, at Muskogee, Western District of Indian Territory, on the 21st day of August A. D. 1906 at 3:05 o'clock P. M.

And the within named defendant, Sullivan Thorn, is not found in this district.

LEO E. BENNETT,
United States Marshal.
By DAVID ADAMS,
Deputy Marshal.

[Endorsed:] No. 6816. Summons in Equity. Chapple vs. Gidney et al. Western District, Indian Territory, and filed Sept. 8, 1906. R. P. Harrison, Clerk of U. S. Court.

Marshal's fees:

$4.00
1.20

$5.20

Raymond, Maxey & Runyon, Attorney- for Plaintiff.

36½ And afterwards, to-wit: On the 8th day of October, 1906, the same being one of the regular days of the United States Court of the Western District of the Indian Territory, at Muskogee, the Honorable William R. Lawrence, Judge presiding, the following further proceedings were had in this cause, to-wit:

Equity. 6816.

SYDNEY C. CHAPPLE
vs.
SAMUEL E. GIDNEY.

And comes the defendant, Samuel E. Gidney, and filed his separate answer to the complaint herein; said separate answer is attached hereto and made a part of this transcript, and is in words and figures as follows, to wit:

37 In the United States Court for the Western District of the Indian Territory, at Muskogee.

SIDNEY C. CHAPPLE, Plaintiff,
vs.
SAMUEL E. GIDNEY, CHARITY DOBBS, and SULLIVAN THORN, Defendants.

Answer of Samuel E. Gidney.

Comes now the defendant, Samuel E. Gidney, and for his sole and separate answer to the complaint of the plaintiff, states that it is true that Sarah Rawlings, formerly Sarah Chapple, the mother of the plaintiff, now deceased, on or about the 23rd day of October, 1905, executed her last will and testament; it is true that thereafter, on the 17th day of June, 1906, she departed this life, leaving the plaintiff, her only child and sole heir at law; it is true that the said Sarah Rawlings, under and by said last will and testament bequeathed all of her estate, both real and personal, as set forth in said complaint, but the defendant denies that the property so bequeathed and so set forth in said complaint was of the value of thirty thousand dollars, or more.

Defendant further admits that on the 13th day of April, 1906, the said Sarah Rawlings executed a codicil to her will above mentioned, and that under and by said codicil bequeathed Charity Dobbs and Sullivan Thorn property as set forth in said complaint.

Defendant further admits that on the 3rd day of July, 1906, said last will and testament of said Sarah Rawlings was exhibited in the United States Court for the Western Judicial District of the Indian Territory, sitting in Probate, for probate, and the same was probated, and letters testamentary thereon were granted to the defendant,

Samuel E. Gidney, named in said instrument of writing, to
38 act as executor of said will, and the defendant then and there duly qualified and became sole executor of the said last will and testament of the said Sarah Rawlings, deceased.

Defendant denies that the said Sarah Rawlings, at the time of the execution of said will was not of sound and disposing mind and memory, and that she was so weak and feeble from ill health, and her mind and memory so impaired as to render her wholly incapable of making a just or proper disposition of her estate.

Defendant further denies that he used and exercised any undue arts and fraudulent practices, or resorted to falsehoods and misrepresentations to induce the said Sarah Rawlings to execute said instrument of writing, or that the said Sarah Rawlings in executing the same was under improper restraint or undue influence from the arts and fraudulent practices of the defendant.

Defendant further denies that in order to induce the said Sarah Rawlings to execute said instrument in writing, he took advantage of his confidential position as attorney and legal adviser of the said Sarah Rawlings, and poisoned her mind or alienated her affections from the plaintiff and other relatives by false statements as to what he was doing for her, and how little the plaintiff and other relatives cared for her, and that he was in fact her only true friend and in her weak and emaciated condition physically, and on account of her mental condition, her mind and memory being so impaired as to render he- susceptible to his arts and fraudulent practices, obtained such control over the mind of the said Sarah Rawlings as to render her incapacitated to know what she was doing at the time that she executed said will.

Defendant admits that he was, some months prior to the death of said Sarah Rawlings, her attorney and adviser, but he denies that as such he ever exercised any undue influence over her, or that she was under his arts and influence at the time of the execution of her said last will and testament; he further denies that at the time of the
execution of said will, she was from that cause or any other
39 cause incapable of doing anything other than that which he advised; and he further denies that she would not have executed her said last will and testament but for his undue influence over her, as alleged in said complaint.

Defendant further denies that the paper which was admitted to probate by the United States Court for the Western Judicial District of the Indian Territory, is not the last will and testament of the said Sarah Rawlings.

Having fully answered, defendant prays to be hence dismissed with his reasonable costs in this behalf expended.

BENJ. MARTIN, JR.,
HUTCHINGS, MURPHY & GERMAN,
Attorneys for Samuel E. Gidney, Defendant.

UNITED STATES OF AMERICA,
Indian Territory, Western Judicial District, ss:

Samuel E. Gidney, being first duly sworn, states that he is the defendant answering herein, that he has read the foregoing answer, and that the statements and allegations therein made are true.

SAMUEL E. GIDNEY.

Subscribed and sworn to before me this 2nd day of October, 1906.

MINNIE P. DUMAS,
Notary Public.

My commission expires January 12, 1907.

40 And afterward, to-wit: On the 30th day of October, 1906, the same being one of the regular days of the United States Court of the Western District of the Indian Territory, at Muskogee, the Honorable William R. Lawrence, Judge presiding, the following further proceedings were had in this cause, to wit:

Equity, 6816.

SYDNEY C. CHAPPLE
vs.
SAMUEL E. GIDNEY.

And now on this day, by agreement of the parties in open Court, this cause is set for hearing December 3rd, 1906.

41 And afterward, to-wit: On the 16th day of November, 1906, the defandant, Samuel E. Gidney, by his attorneys, Hutchings, Murphy & German, filed a notice and motion to make new parties plaintiff in this case, said notice and motion being in words and figures as follows, to-wit:

42 In the United States Court for the Western District of the Indian Territory, Sitting at Muskogee.

No. 6816, Equity.

SYDNEY C. CHAPPLE, Plaintiff,
vs.
SAMUEL E. GIDNEY et al., Defendants.

Notice.

To Sydney C. Chapple, Plaintiff, and Raylond, Maxey & Runyon, His Attorneys:

You and each of you will take notice that the defendant, Samuel E. Gidney will, on November 26, 1906, or the first day prior thereto that the above entitled Court is convened in Muskogee, apply to said

Court to have J. C. Scully of Haskell, Indian Territory, made a party plaintiff with the plaintiff, Sydney C. Chapple in order that a complete determination and settlement of all the interests involved in the subject matter of this action may be tried and determined herein.

A copy of the motion which is this day filed in the office of the Clerk of the United States Court at Muskogee is hereto attached, marked Exhibit A, and made a part of this notice.

HUTCHINGS, MURPHY & GERMAN,
Attorneys for Samuel E. Gidney.

On this day, the 16th day of November, 1906, a true copy of the above notice and motion was served upon us, and received by us.

RAYLAND, MAXEY & RUNYON,
Attorneys for Plaintiff, Sydney C. Chapple.

43 In the United States Court for the Western District of the Indian Territory, Sitting at Muskogee.

No. 6816, Equity.

SYDNEY C. CHAPPLE, Plaintiff,
vs.
SAMUEL E. GIDNEY et al., Defendants.

Motion.

Comes now the defendant, Samuel E. Gidney, and moves the Court to require the plaintiff, Sydney C. Chapple, to join with him as his co-plaintiff in the above entitled action one J. C. Scully of Haskell in the Western District of the Indian Territory, for the reason that prior to the commencement of this suit the said Sydney C. Chapple, plaintiff, by a purported contract and instrument of assignment, dated August 3, 1906, transferred and assigned all his right, title and interest in the undivided one-half interest of all the property owned by the said Sarah Rawlings or in which she had any right, title or interest at the time of her death, and to which the said Sydney C. Chapple became heir and legal owner, and thereby the said Sydney C. Chapple plaintiff herein, conveyed his undivided one-half interest in said estate to the said J. C. Scully, if any he had or possessed, a copy of which contract and instrument of assignment and conveyance is hereto attached, marked Exhibit A, and made a part of this motion.

This defendant states, without admitting the validity of said pretended assignment, or that the said plaintiff, Sydney C. Chapple, has any estate in the subject matter of this action, that if he has any, said instrument purports to convey the undivided one-half to the said J. C. Scully, and the plaintiff, Sydney C. Chapple by
44 reason thereof is not the owner as heir or otherwise of the whole of said estate, and is not the real party in interest in all the property sought to be recovered by him in this action, but

that J. C. Scully, by said deed of assignment and conveyance or contract, is the owner of an undivided one-half interest therein, if said instrument conveys any right or title thereto, and the said J. C. Scully thereby claims an ownership in one-half of the property involved in this action, and to that extent is the real party in interest with the said Sydney C. Chapple in this action, and should be joined as a party plaintiff with him.

Wherefore, this defendant, Samuel E. Gidney, prays the Court that J. C. Scully may be made a party plaintiff herein to the end that the rights of all the parties claiming an interest in the subject matter of this action may be united, and their interest and title therein determined in this action, and that a complete determination and settlement of all the interests involved may be had herein.

HUTCHINGS, MURPHY & GERMAN,
Attorneys for Defendant, Samuel E. Gidney.

45 EXHIBIT A.

INDIAN TERRITORY,
Western Judicial District, ss:

This contract entered into at Haskell, Indian Territory, this 3rd day of August, 1906, by and between Sidney C. Chapple and J. C. Scully.

Witnesseth: That whereas Sarah Rawlings, mother of the said Sidney C. Chapple, who recently died, leaving as her only heir the said Sidney C. Chapple, and an instrument purporting to be a will of the said Sarah Rawlings has been admitted to probate in the U. S. District Court at Muskogee, I. T., in which instrument all the property, both real and personal, of the said Sarah Rawlings has been devised and bequeathed to one Samuel E. Gidney, of Muskogee, I. T., which instrument is not the will of the said Sarah Rawlings.

And Whereas, the said Sidney C. Chapple is desirous of contesting the said purported will, and for said purpose enters into this contract.

For and in consideration of one dollar and legal services which have been and which will be hereafter furnished, the said Sidney C. Chapple in contesting the said purported will, which legal services were furnished and will be hereafter furnished by the said J. C. Scully, who has retained W. F. Schuermyer and other counsel to contest said purported will as aforesaid and who had paid and contracted for the further payment for the said legal services, the said Sidney C. Chapple does hereby grant, bargain, sell, convey and transfor to the said J. C. Scully one half interest in and to all the property owned by the said Sarah Rawlings or in which she had any right, title or interest at the time of her death and to which the said Sidney C. Chapple became heir and legal owner, said property consisting of the following, to-wit:

Lots 7, 8, 9, and 10, block 62, in the town of Haskell, I. T. with all improvements thereon, all personal property owned by the said Sarah Rawlings as her inventory on file in the U. S. District Court

at Muskogee, I. T., stock evidenced by certificate #214 of
46 the National Exchange Bank of Dallas, Texas, and all interest of the said Sarah Rawlings in the estate of H. H. Rawlings, deceased, of which estate Lee Hughes of Dallas, Texas, is administrator, said estate consisting of real property situated in Ellis County, Texas and in the city of Dallas, Texas, and all other property and effects and for the aforesaid consideration, it is further agreed upon by both parties to this contract that the said J. C. Scully shall have and receive one-half (½) of all money or property obtained by judgment of Court or by settlement of parties in the contest of said purported will. As a further consideration, J. C. Scully agrees to pay and advance and pay all the Court costs required in the said contest, but it is also agreed that both parties to this contract are to pay equal share of said costs on the final adjustment of said contest.

Both parties to this contest agree to all the terms herein contained and in witness whereof now affix their hands hereto this 3rd day of August, 1906, at Haskell, Indian Territory.

SIDNEY C. CHAPPLE.
J. C. SCULLY.

Witnesses to signatures:
W. F. SCHUERMYER.

INDIAN TERRITORY,
Western Judicial District, ss:

Before me, R. Brownbridge, a Notary Public, duly commissioned and acting, as such in and for the above named district and Territory personally appeared Sidney C. Chapple, well known to me as the party designated as one of the parties to the foregoing deed and contract, and who acknowledged that he executed the same of his own free will and accord and for the purposes and consideration therein mentioned to which I certify.

In witness whereof, I hereto affix my seal and hand as such Notary Public, this 3rd day of August, 1906.

[SEAL.]

R. BROWNBRIDGE,
Notary Public.

My commission expires Nov. 14th, 1906.

47 In the United States Court for the Western District of the Indian Territory, Sitting at Muskogee.

No. 6816, Equity.

SYDNEY C. CHAPPLE, Plaintiff,
vs.
SAMUEL E. GIDNEY et al., Defendants.

Motion.

Comes now the defendant, Samuel E. Gidney, and moves the Court to require the plaintiff, Sydney C. Chapple, to join with

him as his co-plaintiff in the above entitled action one J. C. Scully of Haskell in the Western District of the Indian Territory, for the reason that prior to the commenc-ment of this suit the said Sydney C. Chapple, plaintiff, by a purported contract and instrument of assignment, dated August 3, 1905, transferred and assigned all his right, title and interest in the undivided one-half interest of all the property owned by the said Sarah Rawlings or in which she had any right, title or interest at the time of her death, and to which the said Sydney C. Chapple became heir and legal owner, and thereby the said Sydney C. Chapple, plaintiff herein, conveyed his undivided one-half interest in said estate to the said J. C. Scully, if any he had or possessed, a copy of which contract and instrument of assignment and conveyance is hereto attached, marked Exhibit "A," and made a part of this motion.

This defendant states, without admitting the validity of said pretended assignment, or that the said plaintiff, Sydney C. Chapple, has any estate in the subject matter of this action, that if he has any, said instrument purports to convey the undivided one-half thereof to the said J. C. Scully, and the plaintiff, Sydney C. Chapple by reason thereof is not the owner as heir or otherwise of the
48 whole of said estate, and is not the real party in interest in all the property sought to be recovered by him in this action, but that J. C. Scully, by said deed of assignment and conveyance or contract, is the owner of an undivided one-half interest therein, if said instrument conveys any right or title thereto, and the said J. C. Scully thereby claims an ownership in one-half of the property involved in this action, and to that extent is the real party in interest with the said Sydney C. Chapple in this action, and should be joined as a party plaintiff with him.

Wherefore, this defendant, Samuel E. Gidney, prays the Court that J. C. Scully may be a party plaintiff herein to the end that the rig-ts of all the parties claiming an interest in the subject matter of this action may be united, and their interest and title therein determined in this action, and that a complete determination and settlement of all the interests involved may be had herein.

HUTCHINGS, MURPHEY & GERMAN,
Attorneys for Defendant, Samuel E. Gidney.

Exhibit A.

Indian Territory,
Western Judicial District, ss:

This contract entered into at Haskell, Indian Territory, this 3rd day of August, 1905, by and between Sidney C. Chapple and J. C. Scully.

Witnesseth: That whereas Sarah Rawlings, mother of the said Sydney C. Chapple, who recently died, leaving as her only heir the said Sydney C. Chapple, and an instrument purporting to be a will of the said Sarah Rawlings has been admitted to probate in the U. S. District Court at Muskogee, I. T., in which instrument all the property, both real and personal, of the said Sarah Rawlings has

been devised and bequeathed to one Samuel E. Gidney of Muskogee, I. T., which instrument is not the will of the said Sarah Rawlings.

49 And Whereas, the said Sydney C. Chapple is desirous of contesting the said purported will, and for said purposes enters into this contract.

For and in consideration of one dollar and legal services which have been and which will be hereafter furnished the said Sydney C. Chapple in contesting the said purported will, which legal services were furnished and will be hereafter furnished by said J. C. Scully who has retained W. F. Schuermyer and other counsel to contest said purported will as aforesaid and who has paid and contracted for the further payment for the said legal services, the said Sydney C. Chapple does grant, bargain, sell, convey and transfer to the said J. C. Scully one half interest in and to all the property owned by the said Sarah Rawlings or in which she had any right, title, or interest at the time of her death and to which the said Sydney C. Chapple became heir and legal owner, said property consisting of the following, to wit:

Lots 7, 8, 9, and 10, Block 62, in the town of Haskell, I. T., with all improvements thereon, all personal property owned by the said Sarah Rawlings as per inventory on file in the U. S. District Court at Muskogee, I. T., stock evidenced by certificate #214 of the National Exchange Bank of Dallas, Texas, and all interest of the said Sarah Rawlings in the estate of H. H. Rawlings, deceased, of which estate Lee Hughes of Dallas, Texas, is administrator, said estate consisting of real property situated in Ellis County, Texas, and in the City of Dallas, Texas, and all other property and effects and for the aforesaid consideration, it is further agreed upon by both parties to this contract that the said J. C. Scully shall have and receive one half of all money or property obtained by judgment of Court or by settlement of parties in the contest of said purported will.

50 As a further consideration, J. C. Scully agrees to pay and advance and pay all the Court costs required in the said contest, but it is also agreed that both parties to this contract are to pay equal share of said costs on the final adjustment of said contest.

Both parties to this *contest* agree to all the terms herein contained and in witness whereof now affix their hands hereto this 3rd day of August, 1906, at Haskell, Indian Territory.

SYDNEY C. CHAPPLE.
J. C. SCULLY.

Witnesses to signature:
W. F. SCHUERMYER.

INDIAN TERRITORY,
Western Judicial District, ss:

Before me, R. Brownbridge, a Notary Public, duly commissioned and acting as such in and for the above named district and Territory, personally appeared Sidney C. Chapple, well known to me as the party designated as one of the parties to the foregoing deed and

contract, and who acknowledged that he executed the same of his own free will and accord and for the purposes and considerations therein mentioned to which I certify.

In Witness Whereof, I hereto affix my seal and hand as such Notary Public, this 3rd day of August, 1906.

[SEAL.] R. BROWNSBRIDGE,
Notary Public.

My Commission expires November, 14th, 1906.

On the back of said instrument omitting the caption thereof appears the following: Western District, Ind. Ter. Filed Nov. 16th, 1906. —— ——, Clerk United States Courts.

51 And afterward, to-wit: On the 26th day of November, 1906, the same being one of the regular days of the United States Court of the Western District of the Indian Territory, at Muskogee, the Honorable William R. Lawrence, Judge, presiding, the following further proceedings were had in this cause, to-wit:

Equity, 6816.

SYDNEY C. CHAPPLE
vs.
SAMUEL E. GIDNEY.

And comes the defendant and files his motion that J. C. Scully be made a party plaintiff herein, and said motion coming on to be heard, and the Court, being fully advised in the premises, doth allow said motion, and it is ordered *the* J. C. Scully be, and he is hereby, made a party plaintiff herein; and the appearance of the said J. C. Scully is entered.

52 And afterward, to-wit: On the 28th day of November, 1906, the same being one of the regular days of the United States Court of the Western District of the Indian Territory, at Muskogee, the Honorable William R. Lawrence, Judge, presiding, the following further proceedings were had in this cause, to-wit:

Equity, 6816.

SYDNEY C. CHAPPLE
vs.
SAMUEL E. GIDNEY.

And comes the plaintiff and files his amended complaint herein, said amended complaint is attached hereto and made a part of this transcript and is in words and figures as follows, to-wit:

53 In the United States Court for the Indian Territory, Western District, at Muskogee.

SIDNEY C. CHAPPLE, Plaintiff,
vs.
SAMUEL E. GIDNEY, Defendant.

Amendment to Complaint.

Comes now, J. C. Scully, who has been made a party to this cause by order of court, and states that on the 3rd day of August 1906, he purchased a one half interest in the estate of Sarah Rawlings deceased, from Sidney C. Chapple, and now claims one half of whatever said Sidney Chapple may recover in this action, and makes himself a co-plaintiff with said Sidney C. Chapple in this action, and adopts the complaint of said Sidney C. Chapple filed in this cause as his complaint, and asks that this cause proceed as if he had been joined as plaintiff with the said *Si* Sidney C. Chapple at filing of the original complaint.

W. F. SCHUERMYER,
RAYMOND, MAXEY & RUNYON,
Attorneys for the Plaintiffs.

54 And afterward, to-wit: On the 1st day of December, 1906, the same being one of the regular days of the United States Court of the Western District of the Indian Territory, at Muskogee, the Honorable William R. Lawrence, Judge, presiding, the following further proceedings were had in this cause, to-wit:

Equity, 6816.

SYDNEY C. CHAPPLE, Plaintiff,
vs.
SAMUEL E. GIDNEY, Defendant.

And comes the defendant and files his motion that plaintiff be ruled to make the amended complaint herein more definite and certain. And come both parties and in open Court agree to try this cause by a Jury on the 3rd day of January, 1907. Said motion, above mentioned, being in words and figures as follows, to-wit:

55 In the United States Court for the Western District of the Indian Territory, Sitting at Muskogee.

SIDNEY C. CHAPPLE and J. C. SCULLY, Plaintiffs,
vs.
SAMUEL E. GIDNEY et al., Defendants.

Motion.

Comes now the defendant, Samuel E. Gidney, and moves the court for an order requiring the plaintiffs in the above entitled cause, to make their amended complaint more definite specific and certain in this, to-wit:

To state by virtue of what contract the plaintiff, J. C. Scully, purchased of his co-plaintiff, Sidney C. Chapple, a one-half interest in the estate of Sarah Rawlings, deceased, and if by contract in writing, that said contract or a copy thereof be set up in said amended complaint; so that this defendant may be advised of what the true interest of the plaintiff, J. C. Scully is to the end that he may intelligently plead to said amended complaint; and also, for an order on plaintiffs to incorporate their new matter of amendment in one instrument or pleading as their amended pleading and not in two separate papers, so that this defendant may intelligently plead thereto.

HUTCHINGS, MURPHY & GERMAN,
Attorneys for Defendant Gidney.

56 And afterward, to-wit: On the 4th day of December, 1906, the same being one of the regular days of the United States Court of the Western District of the Indian Territory, at Muskogee, the Honorable William R. Lawrence, Judge, presiding, the following further proceedings were had in this cause, to-wit:

Equity, 6816.

SYDNEY C. CHAPPLE
vs.
SAMUEL E. GIDNEY.

On this day the defendant's motion to make the amended complaint more definite and certain, filed herein on December 1st, 1906, comes on to be heard; and the Court, having heard the argument of counsel, and being well and sufficiently advised in the premises, doth sustain said motion, and leave is hereby granted to plaintiff to file an amended complaint within ten days from this date.

57 And afterward, to-wit: On the 6th day of December, 1906, the same being one of the regular days of the United States Court of the Western District of the Indian Territory, at

Muskogee, the Honorable William R. Lawrence, Judge, presiding, the following further proceedings were had in this cause, to-wit:

Equity, 6816.

SYDNEY C. CHAPPLE
vs.
SAMUEL E. GIDNEY.

And comes the plaintiff and filed his amended complaint herein; And it is ordered that the defendant, be, and he is hereby, given ten days from this date in which to plead or answer. Said amended complaint, above mentioned, is attached hereto and made a part of this transcript and is in words and figures as follows, to-wit:

58 In the United States Court for the Western District of the Indian Territory, at Muskogee, in Chancery Sitting.

6816.

SYDNEY C. CHAPPLE and J. C. SCULLY, Plaintiffs,
vs.
SAMUEL E. GIDNEY, CHARITY DOBBS, and SULLIVAN THORN, Defendants.

Amended Complaint.

To the Honorable William R. Lawrence, Judge of the United States Court for the Western District of the Indian Territory, at Muskogee, in Chancery Sitting:

Comes now your petitioners, Sydey C. Chapple and J. C. Scully and in compliance with an order of Court made and entered on the 4th day of December, 1906, amend their complaint so that the same shall read as follows:

Your petitioners, Sydney C. Chapple and J. C. Scully respectfully represent unto your Honor that they are citizens of the United States and residents of the Western District of the Indian Territory and that the defendants, Samuel E. Gidney and Charity Dobbs, are citizens of the Western District of the Indian Territory and that they are residents thereof and that the defendant, Sullivan Thorn resides at Senoraville, Georgia and that the nearest place of holding Court in the Western District to the residence of the defendants, Samuel E. Gidney and Charity Dobbs, is at Muskogee and that the subject matter of this suit is pending in the Probate Court of the Western District of the Indian Territory at Muskogee.

Your petitioners further represent, unto your Honor, that one Sarah Rawlings, formerly Sarah Chapple, the mother of your petitioner, Sydney C. Chapple, late of the town of Haskell, Western District, Indian Territory, but now deceased, on or about the 23"

day of October, 1905, executed a certain instrument in writ-
59 ing purporting to be her last Will and Testament; and thereafterwards, to-wit, on the 16" day of June, 1906, departed this life, leaving your petitioner, Sydney C. Chapple, her only child and sole heir at law.

Your petitioners further represent, that the said Sarah Rawlings, under and by the said instrument of writing, so purporting to be her last Will and Testament, professedly bequeathes all of her estate, both real and personal, as follows:

To Sydney C. Chapple, who is one of your petitioners, $500.00, with any debt which he may be owing to the said Sarah Rawlings at the time of her death; to Samuel E. Gidney, who is one of the defendants herein, and his heirs and assigns forever, all of the rest, residue and remainder of her estate, real an- personal and mixed, of whatsoever kind, and wheresoever situated, whereof, she may die seized or possessed, or have an interest in at the time of her death, which property consisted of real estat-, bank stock, cash on hand and personal property of the value of Thirty Thousand Dollars or more; and thereafter, to-wit, on the 13" day of April, 1906, said Sarah Rawlings, executed an instrument in writing, purporting to be a codicil to her aforesaid purported Will and under and by said instrument of writing, so purporting to be a codicil to her purported Will aforesaid, professedly bequeathes to Charity Dobbs, the sum of Fifty Dollars and to her brother, Sullivan Thorn, of Senoraville, Georgia, all of her dresses, cloaks, clothing and such wearing apparel, as will more fully appear from the said instrument in writing, when produced in Court and from a copy of the same hereto attached, marked exhibit "A" and made a part of this Complaint.

Your petitioners further represent, that on the 3" day of July, 1906, the said instrument of writing, purporting to be the last Will and Testament of the said Sarah Rawlings, was exhibited to the United States Court for the Western District of the Indian Territory, at Muskogee, sitting in Probate, for probate, by the said Samuel E. Gidney and the same was then and there probated in common
60 form and letters testamentary thereon were granted to the defendant, Samuel E. Gidney, the person named in said instrument of writing to act as executor of said purported Will, and the said Samuel E. Gidney, then and there duly qualified, and took upon himself the burden of Executor of the said supposed Will of the said Sarah Rawlings, deceased.

Your petitioners further represent, that the said Sarah Rawlings, at the time of the execution, of said instrument of writin*h*, purporting to be her last Will and Testament, was not of sound and disposing mind and memory, but on the contrary, she was so weak and feeble from ill health and her mind and memory was so impaired as to render her wholly incapable of making any just and proper disposition of her estate.

Your petitioners further represent, that the defendant, Samuel E. Gidney, the principal legatee in said pretended Will, used and exercised many undue arts and fraudulent practices and resorted to false-

hoods and misrepresentations to induce the said Sarah Rawlings to execute said instrument of writing and the said Sarah Rawlings in executing the same, was in fact, under improper restraint and undue influence from the arts and fraudulent practices of the defendant Samuel E. Gidney.

Your petitioners *practicularly* represent, that the defendant, Samuel E. Gidney, in order to induce the said Sarah Rawlings, to execute the said instrument in writing, took advantage of his confidential position and relation as attorney and legal adviser of the said Sarah Rawlings and poisoned her mind and alienated her affections from your petitioner, Sydney C. Chapple and her other relatives by false and fraudulent statements as to what he was doing for her, and how little your petitioner, Sydney C. Chapple, and her other relatives cared for her, and that he was in fact her only true friend, and in her weak and emaciated condition physically, and on account of her mental condition, her mind and memory, being so impaired as to render he- susceptible to his arts and fraudulent practices, the said defendant, Samuel E. Gidney, obtained such control over the
61 mind of the said Sarah Rawlings as to render her incapacitated to know what she was doing at the time she executed the said purported Will, and by reason of the undue influence exercised over her by the said Samuel E. Gidney, who was and had been, a long time prior thereto, her lawyer and confidential adviser, she was so much under his arts and influences at the time of the execution of the said instrument in writing, purporting to be her last Will and Testament, as to be incapable of doing anything other than that which he advised and but for such undue influence exercised over her by the said Samuel E. Gidney, she would not have executed the instrument purporting to be her last Will and Testament.

Your petitioners further represent that said paper which was as aforesaid admitted to probate by said United States Court for the Western District of the Indian Territory, is not the last Will and Testament of the said Sarah Rawlings.

Your petitioners further represent unto your Honor, that by reason of the said Samuel E. Gidney, through his arts and fraudulent practices aforesaid, procuring the said Sarah Rawlings to execute said instrument of writing purporting to be her last Will, and procuring the same to be admitted to probate that it so incumbered the estate of said Sarah Rawlings, which of right belongs to your petitioner, Sydney C. Chapple, that he, the said Sydney C. Chapple, was unable to obtain control or possession of any part of said estate and being poor and almost destitute of means, to prosecute an action to set aside said Will and other fraudulent conveyances procured by said Samuel E. Gidney, was compelled to procure money from some other source in order to enable him to prosecute the necessary suits to set aside said Will and other fraudulent conveyances procured by the said Samuel E. Gidney and on the 3" day of August, 1906, he entered into a contract with his co-plaintiff, J. C. Scully, whereby the said J. C. Scully agreed to employ counsel and advance the necessary moneys for prosecuting said suits in the proper Court to set aside said Will and other

conveyances and in consideration thereof, said J. C. Scully is
62 to receive one half of whatever property might be recovered in said suit, a copy of said contract is hereto attached, marked Exhibit "B."

Wherefore, the plaintiffs pray that the validity of said paper writing purporting to be the last Will and Testament of Sarah Rawlings be determined in this action and that the same be adjudged invalid and void and that the said Sarah Rawlings died intestate and for such other and further relief as may be just together with the costs of this action; that an issue devisavit vel non, as to the validity of said Will, to be tried by a jury and that judgment be rendered setting aside the probating of said Will and declaring the Will void and of no effect.

That the said Samuel E. Gidney, executor under said pretended Will be required to account for all of that portion of said estate which may have come into his hands from any source whatever and that he be required to pay to the plaintiffs herein any moneys that may have come into his hands as executor of said estate and for all such other anf further relief as to the Court may seem proper.

W. F. SCHUERMYER,
RAYMOND, MAXEY & RUNYON,
Attorneys for Plaintiffs.

Sydney C. Chapple, being duly sworn states that he is on- of the plaintiffs in the above entitled cause and that he has heard *in* foregoing complaint read and knows the contents thereof and that the same are true as he verily believes.

SYDNEY C. CHAPPLE.

Subscribed and sworn to before me, this 5th day of December, 1906.

R. BROWNBRIDGE,
Notary Public.

My commission expires Nov. 14, 1908.

63 PLAINTIFF'S EXHIBIT "A."

UNITED STATES OF AMERICA,
Indian Territory, Western District, ss:

Will of Sarah Rawlings.

I, Sarah Rawlings, formerly Sarah Craig, of Haskell, Western District aforesaid, being of sound and disposing mind and memory, but sensible of the uncertainty of life, do hereby, make, publish and declare the following to be my last Will and Testament, hereby revoking and declaring utterly void all other and former Wills and Testaments be me, at any time, made:

First: My executor, hereinafter named, shall give my body a decent burial in my lot in Mount Holly Cemetery at Little Rock,

Arkansas, beside a former husband of mine, Edward Chapple; the said lot having been deeded to me in my former name Sarah Chapple; and shall erect at my grave a good monument, placing thereon my name, the date of my death and the date of my birth, which is May 10, 1865; and pay all funeral expenses, together with all of my just debts out of the first money which may come into his hands belonging to my estate; the said funeral expenses and monument to be at the discretion of my said executor; and he shall pay himself whatever expenses he may be put to in looking after the same, whether in traveling expenses or otherwise.

Second: I give and bequeath to my only child, Sidney Chapple, Five Hundred ($500.00) Dollars, together with any debt which at the time of my decease, shall be owing from him to me, together with any interest then due thereupon; the said sum of Five Hundred ($500.00) Dollars to be paid my aforesaid son by the executor named herein at such times as in the discretion of my said executor he may feel that the condition of my estate may warrant the same; but if my said son died before me or does not apply for the legacy herein within twelve (12) months *after* my death, or does not in the said time accept the same in full of all interest and claim in my estate, then in either event, I give and bequeath the said legacy intended for him to my trusted friend, Samuel E. Gidney, of Muskogee,
Indian Territory, his heirs, executors and administrators and
64 assigns, absolutely forever. My said son has been the recipient of a considerable amount of money from me, and I have endeavored to win his love, care and affection, but he has signally failed to perform his filial duty toward me, and has been neglectful, wild and reckless, and has brought added sorrow to my life, and I pray that yet he may see the error of his ways, and be saved under the grace of God, and yet be a blessing.

Third. Whereas, I have not heard from an only brother of mine for ten (10) years or more, and have not heard from any of my relatives for many years;

Whereas, neither he nor they have ever manifested any interest in or care for me, and are strangers to me, and I do not desire that they nor their heirs receive anything from my estate;

And, whereas, Samuel E. Gidney of Muskogee, Indian Territory, has been to me a true and trusted friend, and in many ways has contributed to my relief and comfort;

And, Whereas, It is my desire that he shall be at least partially compensated therefor, I therefore, do hereby give, devise, bequeath all of the rest, residue and remainder of my estate, real, personal and mixed, and whatsoever kind, or wheresoever situated, whereof, I may be seized or possessed, or I might in any manner be entitled or in which I may be interested at the time of my death, unto my worth- and trusted friend, Samuel E. Gidney, and to his heirs, executors, administrators and assigns, absolutely forever, together with all the hereditaments and appurtenances thereunto belonging or in any wise appertaining;

To have and to hold, the same to the said Samuel E. Gidney, his heirs and assigns, forever. And if the said Samuel E. Gidney, dies

before me, I give, bequeath and devise the legacies and devises intended for him to his heirs, executors, administrators, or assigns, according as the same may be, real or personal or mixed property.

65 Fourth: I hereby make, nominate, constitute and appoint, Samuel E. Gidney, of the City of Muskogee, Indian Territory, Western District, my lawful executor to all intents and purposes, to execute this my last Will and Testament, according to the true intent and meaning of the same, and every part and clause thereof.

Fifth: In case of the death of my executor, or of his resignation, incapacity or refusal to qualify and act, I hereby make, nominate, constitute and appoint Benjamin Martin, Jr., of the City of Muskogee, Western District of the Indian Territory, my lawful executor to all intents and purposes to execute this my last Will and Testament, according to the true intent and meaning of the same.

In Witness Whereof, I, the said Sarah Rawlings, formerly Sarah Craig, have to this my last Will and Testament consisting of three (3) Sheets, subscribed my name and set my seal, in the Western District Indian Territory, on this 23" day of October, 1905.

SARAH RAWLINGS. [SEAL.]

The foregoing instrument consisting of three (3) pages, was on this 23" day of October, 1905, signed, sealed, published and declared by the Testatrix, Sarah Rawlings, formerly Sarah Craig, to be her said last Will and Testament, in the presence of each of us, the undersigned, each of whom is over the age of twenty one years, and who thereupon, at her request, and in her presence, and in the presence of each other, have hereunto subscribed our names as attesting witnesses thereof, the day and year last above written.

Name: FRED V. MADDIN,
P. O., Muskogee, I. T.
Name: W. M. CHANDLER,
P. O., Muskogee, I. T.
Name: GEORGE McMILLIN,
P. O., Muskogee, Ind. Ter.

Signed in Maddin Building, Room 18, Muskogee, I. T.:

Codicil to the Will of Sarah Rawlings.

I, Sarah Rawlings, of Haskell, Indian Territory, having made my last Will and Testament bearing date the 23" day of October
66 1905, the same having been witnessed by Fred V. Maddin, George McMillin and W. M. Chandler, do now make this codicil to be taken as a part of the same.

First: I hereby ratify and confirm said Will in every respect, save so far as any part of it is inconsistent with this codicil.

Second. I give and bequeath to Mrs. Charity Dobbs, of Haskell, Indian Territory, who has been a kind nurse to me, the sum of Fifty (50) Dollars.

Third. I have recently heard from my brother, Sullivan Thorn, of Senoraville, Georgia, and in case he or any one for him in his family will accept the same, I give and bequeath to my said brother, Sullivan Thorn, all of my dresses, cloaks, clothing and such wearing apparel.

In Witness Whereof, I, Sarah, Rawlings, have to this codicil to my last Will and Testament, subscribed my name and set my seal on this 13 day of April, 1906.

SARAH RAWLINGS. [SEAL.]

Witnesses:

D. B. McARTHUR,
P. O., Haskell, I. T.
RALPH DRESBACK,
P. O., Haskell, I. T.

67 PLAINTIFF'S EXHIBIT "B."

INDIAN TERRITORY,
Western Judicial District, ss:

This contract entered into at Haskell, Indian Territory, this 3rd of August, 1906, by and between Sidney C. Chapple and J. C. Scully.

Witnesseth: that, whereas, Sarah Rawlings, mother of the said Sidney C. Chapple, who recently died, leaving as her only heir the said Sidney C. Chapple, and an instrument purporting to be a Will of the said Sarah Rawlings has been admitted to probate in the U. S. District Court at Muskogee, I. T., in which instrument all the property, both real and personal of the said Sarah Rawlings has been devised and bequeathed to one Samuel E. Gidney of Muskogee, I. T., which instrument is not the Will of the said Sarah Rawlings.

And Whereas, the said Sidney C. Chapple is desirous of contesting the said purported Will and for said purpose enters into this contract.

For and in consideration of One Dollar and legal services which have been and which will be hereafter furnished to the said Sidney C. Chapple in contesting the said purported Will, which legal services were furnished and will be hereafter furnished by the said J. C. Scully who has retained W. F. Schuermyer and other counsel to contest said purported Will as aforesaid and who has been paid and contracted for the further payment for the said legal services, the said Sidney C. Chapple does hereby grant, bargain, sell, convey and transfer to the said J. C. Scully one half interest in and to all the property owned by the said Sarah Rawlings or in which she had any right, title or interest at the time of her death and to which the said Sydney C. Chapple became heir and legal owner, said property consisting of the following, to-wit: Lots 7, 8, 9 & 10 Block 62 in the town of Haskell, I. T., with all improvements thereon, all personal property owned by the said Sarah Rawlings as per inventory
68 on file in the U. S. District Court at Muskogee, I. T., stock evidenced by certificate #214 of the National Exchange Bank

of Dallas, Texas, and all interest of the said Sarah Rawlings in the estate of H. H. Rawlings, deceased, of which estate Lee Hughes of Dallas, Texas, is administrator, said estate consisting of real property situated in Ellis County, Texas, and in the City of Dallas, Texas, and other property and effects; and for the aforesaid consideration it is further agreed upon by both parties to this contract that the said J. C. Scully shall have and receive one half (½) of all money or property, obtained by judgment of Court or by settlement of parties in the contest of said purported Will.

As a further consideration J. C. Scully agrees to advance and pay all the Court costs required in the said contest, but it is also agreed that both parties to this contract are to pay equal share of said costs on the final adjustment of said contest.

Both parties to this contract agree to all the terms herein contained and in witness whereof now affix their hands hereto on this 3rd day of August, 1906, at Haskell, Indian Territory.

SIDNEY C. CHAPPLE.
J. C. SCULLY.

Witness to signature:
W. F. SCHUERMEYER.

INDIAN TERRITORY,
Western Judicial District:

Before me, R. Brownbridge, a Notary Public, duly commissioned and acting as such in and for the above named District and Territory personally appeared Sidney C. Chapple, well known to me as the party designated as one of the parties to the foregoing deed and contract, and who acknowledged that he executed the same of his own free will and accord and for the purpose and considerations therein mentioned to which I certify.

In Witness Whereof I hereto affix my seal and hand as such Notary, this 3" day of August, 1906.

[SEAL.] R. BROWNBRIDGE,
Notary Public.

My commission expires Nov. 14", 1908.

69 And afterward, to-wit: On the 17th day of December, 1906, the same being one of the regular days of the United States Court of the Western District of the Indian Territory, at Muskogee, the Honorable William R. Lawrence, Judge Presiding, the following further proceedings were had in this cause, to wit:

Equity. 6816.

SYDNEY C. CHAPPLE
vs.
SAMUEL E. GIDNEY.

And comes the defendant and files his motion to strike a portion of the amended complaint herein, and said motion coming on to be heard, and the Court, having heard the argument of counsel, and

being fully advised in the premises, doth sustain said motion, to which ruling of the Court the plaintiff excepts, and on motion of the plaintiff the defendant is ruled to answer by next Wednesday morning, said motion to strike is attached hereto and made a part of this transcript, and is in words and figures as follows, to-wit:

70 In the United States Court for the Western District of the Indian Territory, Sitting at Muskogee.

SYDNEY C. CHAPPLE et al., Plaintiffs,
vs.
SAMUEL E. GIDNEY et al., Defendants.

Motion.

Comes now the defendant, Samuel E. Gidney, in the above entitled case, and moves the Court for an order requiring the plaintiffs to strike from their amended complaint filed herein the following paragraph, on page four thereof, to wit:

"Your petitioners further represent unto your Honor that by reason of the said Samuel E. Gidney, through his arts and fraudulent practices aforesaid, procuring the said Sarah Rawlings to execute said instrument of writing purporting to be her last will, and procuring the same to be admitted to probate that it so incumbered the estate of said Sarah Rawlings, which of right belongs to your petitioner, Sydney C. Chapple, that he, the said Sydney C. Chapple, was unable to obtain control or possession of any part of said estate, and being poor and almost destitute of means, to prosecute an action to set aside said will and other fraudulent conveyances procured by said Samuel E. Gidney, was compelled to procure money from some other source in order to enable him to pr-secute the necessary suits to set aside said will and other fraudulent conveyances procured by said Samuel E. Gidney"

for the reason that said matter is surplusage and redundant, and unnecessarily incumbers the pleadings and record in this case, and is an attempt to interpolate extraneous matter in such bill of complaint to the prejudice of this defendant and is not germane to any issue involved therein.

HUTCHINGS, MURPHY & GERMAN,
Attorneys for Defendant Samuel E. Gidney.

71 And afterward, to-wit: On the 19th day of December, 1906, the same being one of the regular days of the United States Court of the Western District of the Indian Territory, at Muskogee, the Honorable William R. Lawrence, Judge presiding, the following further proceedings were had in this cause, to-wit:

Equity. 6816.

SYDNEY C. CHAPPLE
vs.
SAMUEL E. GIDNEY.

On this day comes the defendant, Samuel E. Gidney, and files his answer herein. Said answer is attached hereto and made a part of this transcript, and is in words and figures as follows, to-wit:

72 In the United States Court for the Western District of the Indian Territory, Sitting at Muskogee.

No. 6816. Equity.

SYDNEY C. CHAPPLE and J. C. SCULLY, Plaintiffs,
vs.
SAMUEL E. GIDNEY et al., Defendants.

Answer of Samuel E. Gidney.

Comes now the defendant, Samuel E. Gidney, and for separate answer to the amended complaint filed herein, admits that Sydney C. Chapple and J. C. Scully are citizens of the United States, and residents of the Western District of the Indian Territory, and that the defendants, Samuel E. Gidney and Charity Dobbs are residents of the Western District of the Indian Territory, and that the defendant, Sullivan Thorn, resides at Senoraville, Georgia, and that Muskogee is the nearest Court town to the residences of defendants, Samuel E. Gidney and Charity Dobbs, but denies that the subject matter of this suit is pending in the Probate Court for the Western District of the Indian Territory at Muskogee.

Defendant admits that one Sarah Rawlings, formerly Sarah Chapple, late of the town of Haskell, Indian Territory, but now deceased, on or about the 23rd day of October, 1905, executed a certain instrument in writing purporting to be her last Will and Testament; he denies that on the 16th day of June, 1906, she departed this life, but admits that she left the petitioner, Sydney C. Chapple, her only child and sole heir at law, had she died intestate.

Defendant admits that the said Sarah Rawlings, in said instrument of writing did bequeath all of her estate, both real and personal, as set out in plaintiffs' complaint, and states that she died on the 17th day of June, 1906. He denies that said estate, at
73 the time of her death, was of the value of thirty Thousand dollars. He admits that on the 13th day of April, 1906, she executed a codicil to her aforesaid will, and thereby bequeathed to Charity Dobbs the sum of fifty dollars, and her brother, Sullivan Thorn, all of her dresses, clothing, and such wearing apparel as appears in said will, and admits that a copy of said will and codicil is attached to plaintiffs' complaint.

Defendant admits that on the 3rd day of July, 1906, said last will and testament of Sarah Rawlings was exhibited to the United States Court at Muskogee, Indian Territory, sitting in probate, for probate, and the same was then and there probated, and letters testamentary thereon were granted to the defendant, Samuel E. Gidney, the person named in said instrument of writing as executor of said will, and that the said Samuel E. Gidney then and there qualified and became sole executor of the said last will and testament of the said Sarah Rawlings, deceased.

Defendant denies that the said Sarah Rawlings, at the time of the execution of said last will and testament was not of sound and disposing mind and memory, and denies that she was so weak and feeble from ill health, and her mind and memory were so impaired as to render her incapable of making any just and proper disposition of her estate.

Defendant denies that he used and exercised any undue arts and fraudulent practices, or resorted to falsehoods and misrepresentations to induce the said Sarah Rawlings to execute the said instrument of writing, and denies that said Sarah Rawlings, in executing the same was in the fact under improper restraint or undue influence from the arts and fraudulent practices of the defendant, Samuel E. Gidney.

Defendant denies that in order to induce the said Sarah Rawlings to execute the said instrument in writing, he took advantage of his confidential position and relation as attorney and legal adviser of said Sarah Rawlings, so that he poisoned her mind or alien-
74 ated her affections from Sydney C. Chapple and other relatives by false and fraudulent statements as to what he was doing for her, and how little your petitioner, Sydney C. Chapple, and her other relatives cared for her, and that he was in fact her only true friend, and in her weak and emaciated condition physically, and on account of her mental condition, her mind and memory being so impaired as to render her susceptible to his arts and practices, the said defendant obtained such control over her mind as to render her incapacitated to know what she was doing at the time she executed said purported will, and by reason of the undue influence exercised over her by the said Samuel E. Gidney, she was so much under his arts and influence at the time of the execution of said instrument in writing as to be incapable of doing anything other than that which he advised, and denies that but for such undue influence exercised over her by the said Samuel E. Gidney, she would not have executed the instrument purporting to be her last will and testament. He admits that he was her lawyer and confidential adviser, but denies that as such lawyer and confidential adviser, she was so much under his arts and influence at the time of the execution of said instrument as to be incapable of doing anything other than that which he advised.

Defendant denies that said paper admitted to probate by the United States Court for the Western Judicial District of the Indian Territory is not the last will and testament of the said Sarah Rawlings.

As to whether on the 3rd day of August, 1906, the plaintiff, Sydney C. Chapple, entered into a contract with his co-plaintiff, J. C.

Scully, whereby the plaintiff, J. C. Scully, agreed to employ counsel, and advance the necessary monies for prosecuting said suits in the proper courts to set aside said will and other conveyances, and in consideration thereof the said J. C. Scully is to receive one half of the property which might be recovered in said suits, a copy of which contract is purported to be attached as Exhibit B to plaintiff's bill,
75 this defendant has not sufficient information on which to form a belief as to the truth or falsity thereof, and therefore denies the same, and puts plaintiffs on strict proof thereof.

II.

For a further answer, and by way of abatement, the defendant states that on the 22nd day of June, 1906, prior to the bringing of this suit and prior to the alleged assignment of a one-half interest in the subject matter of this action and the property involved therein to his co-plaintiff, J. C. Scully, the said plaintiff, Sydney C. Chapple, for a valuable consideration, bargained, sold, assigned, transferred, conveyed, set over, and delivered to this defendant Samuel E. Gidney, and confirmed in him, the said Samuel E. Gidney, all the right, title, interest, claim, demand and estate, both in law and in equity, of the said Sydney C. Chapple, in and to any and all of the estate, property, real, personal, mixed, of whatsoever kind, and wheresoever situated of the said Sarah Rawlings which he ever had, or then had, or which he or his heirs, executors, or administrators at any time thereafter might have as heirs, distributees, legatees or devisees in and to the said estate of the said Sarah Rawlings, deceased, and thereby granting all powers and remedies to the said defendant, Samuel E. Gidney, for the recovery thereof, which sale and conveyances was on said date evidenced by an instrument in writing, a copy of which is hereto attached, marked Exhibit A, and made a part of this answer.

Defendant alleges that said bill of sale and conveyance is in full force and effect, and was on the — day of June, 1906, recorded in the office of the Clerk of the United States Court at Muskogee, and in the office of the Clerk of the United States Court at Wagoner, Indian Territory, and at other times in other jurisdictions where the property belonging to said estate is situate which record in the Western Judicial District in both of said offices as well as in the city of Dallas in the County of Dallas, State of Texas, was prior to the bringing of
76 this suit and prior to the alleged assignment and sale of the said Sydney C. Chapple of the property involved in this suit to his co-plaintiff, J. C. Scully; and that since the institution of this suit, an action has been brought in this Court by these same parties plaintiff against this defendant for the purpose of setting aside said instrument in writing and cancelling the same, which suit is still pending and undetermined in this Court, and that by reason of these facts the plaintiffs cannot maintain this suit and the same should abate, and that this Honorable Court should enter an order dismissing this suit for that reason, namely, that the plaintiffs have not prosecuted said other suit to final determination, and disclosed that they are parties in interest and have a standing as such parties plain-

tiff in this suit, and for these reasons this defendant prays the judgment of this Court that it will not take further cognizance of this suit, and abate the same.

III.

For further answer and defende herein, the defendant says that in the purchase of the title, legacy and devise of the plaintiff Sydney C. Chapple and of his rights as heir, legatee and devisee in the estate of the said Sarah Rawlings, this defendant, on the 22nd day of June, 1906, as a consideration for said purchase paid to said plaintiff the sum of five hundred and ten dollars, and also a diamond ring and diamond ear-bobs, as a consideration for said purchase, and that the said plaintiff has retained the same, and still retains the same, the consideration for said purchase, and has not returned the same with his bill of complaint in this suit in this Court.

IV.

For further answer, defendant states that in consideration of the release of all the right, title and interest of the said plaintiff, Sydney C. Chapple, in and to the estate of Sarah Rawlings, as devisee and legatee, the said Sydney C. Chapple, on the 22nd day of June, 1906, prior to the bringing of this suit, and prior to the assignment of one-half interest of the subject matter of this suit and the property therein involved, to his co-plaintiff, J. C. Scully, exe-
77 cuted and delivered to this defendant, as executor of said will, a written receipt and release and acquittance as such devisee and legatee and was paid therefor as a consideration for said release and receipt and acquittance, by this defendant, as such executor, the sum of five hundred dollars, and thereby said plaintiff recognized the validity of said Will, and has ever since retained, and still retains the amount paid him for such release and acquittance, and has never tendered the same to this defendant, or brought the same into Court with his bill herein and is thereby estopped to prosecute his suit herein. A copy of said release, receipt and azquittance is hereto attached, marked Exhibit B, and made a part of this answer.

For further answer herein, the defendant says that the alleged instrument of writing purporting to convey from the plaintiff Sydney C. Chapple to his co-plaintiff, J. C. Scully, a one half interest in the subject matter of this action and the property involved therein, is illegal and void, and of no force and effect for the reason that it is champertous and against the policy of the law, the consideration therefor, as shown by said contract, being to employ counsel, the payment of costs by J. C. Scully, and the receipt of the same by the said Sydney C. Chapple, for the purpose and intention on the part of the said J. C. Scully and Sydney C. Chapple to promote litigation, and stir up strife, and is speculative in its nature.

Wherefore, premises considered, defendant prays this Honorable Court that he enter an order abating this suit on account of the facts and matter alleged in abatement, and that this case be dis-

missed, and that he may go hence with his costs and for all other proper and equitable relief in the premises.

HUTCHINGS, MURPHY & GERMAN,
Attorneys for Defendant.

78 UNITED STATES OF AMERICA,
Indian Territory, Western Judicial District, ss:

Samuel E. Gidney, being first duly sworn, states that he is the defendant in the above entitled case, that he has read the foregoing answer and pleas in abatement, and that the allegations therein contained are true.

SAMUEL E. GIDNEY.

Subscribed and sworn to before me this 19th day of December, 1906.

MINNIE P. DUMAS,
Notary Public.

My commission expires January 12, 1907.

79 EXHIBIT B.

Know all men by these presents: That I, Sydney C. Chapple, son heir and legatee of Mrs. Sarah Rawlings, deceased, in consideration of the sum of Five Hundred ($500.00) Dollars, to me in hand paid by Samuel E. Gidney before the signing of these presents, the receipt whereof is hereby acknowledged, by these presents remise, release, and forever discharge the said Samuel E. Gidney, executor of the last Will and Testament of Sarah Rawlings, deceased, of and from all and all manner of actions, suits, accounts, debts, dues and demands whatsoever, which I ever had, now have, or which I or my heirs, executors, or administrators at any time hereafter can or may have, claim, or demand against the said Samuel E. Gidney, his heirs, executors, or administrators for, touching or concerning any of the property, real, personal or mixed of the estate of the said Sarah Rawlings, deceased, or any part thereof, or for or by reason of any money, or other profits by him received out of the same, or by reason of any matter, cause or thing whatsoever.

In witness whereof I have hereunto set my hand and seal this, the 22nd day of June, 1906.

SYDNEY C. CHAPPLE. [SEAL.]

Witnesses:
D. N. FINK.
E. D. SWEENEY.

UNITED STATES OF AMERICA,
Indian Territory, Western Judicial District, ss:

Be it remembered that on this day came before me, the undersigned, a Notary Public within and for the Western Judicial District of the Indian Territory aforesaid, duly commissioned and acting as

such Sidney Chapple to me personally well known as the person whose name appears in the within and foregoing receipt and release as the party grantor, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

Witness my hand and seal as such Notary Public on this 22nd day of June, 1906.

[NOTARIAL SEAL.] C. A. BALLANTYNE,
Notary Public.

My commission expires May 13, 1909.

80 EXHIBIT "A."

Know all men by these presents: That whereas, I, Sidney C. Chapple alias Bibb, am the only surviving child and issue of Mrs. Sarah Rawlings, deceased, and a legatee and sole heir to her estate; and,

Whereas: The said Sarah Rawlings, late of Haskell, Indian Territory, died at her residence at Haskell, aforesaid, on the 17th day of June, 1906; and,

Whereas: At the time of her death she was seized and possessed of two lots in block sixty-two in said town of Haskell upon which is located her brick residence, and was also possessed of certain household and kitchen furniture, horse, cow, etc., and was also the possessor of fifteen (15) shares of the capital stock of the American Exchange National Bank of Dallas, Texas, as represented by certificate numbered two hundred and fourteen (214) of said Bank; and,

Whereas: She is entitled to a one-half interest in the estate of her late husband, H. H. Rawlings, which estate is still in process of settlement, and in which her interest is an undivided one-half interest in approximately three hundred (300) acres of land near the town of Ferris, in the County of Ellis, Texas, and in lots numbered one (1) and two (2) in block numbered eight hundred and thirty-nine (839) and improvements in the City of Dallas, Texas, and Lots seven (7) and fourteen (14) and one-half of Lots numbered six and thirteen (13) in block numbered fifteen (15) in Browder's Providence Addition to the City of Dallas, and the White Rock Mill Tract consisting of about two (2) acres in Dallas County, and Lots eight (8), nine (9) and ten (10) in block numbered five (5) in the town of Pecos, Reeves County, Texas, and of certain undistributed amounts under the control of Lee H. Hughes, Administrator of the estate of H. H. Rawlings, deceased, as shown by the papers in said case filed in the office of the Clerk of the County Court of Dallas County, Texas, in Probate number 3370; and, possible other real and personal property; and,

Whereas, I am desirous of disposing for cash all of my in-
81 terest of whatever kind in the estate of my mother, Sarah Rawlings, deceased, as aforesaid.

Now, Therefore, I, the said Sidney C. Chapple alias Sidney C. Bibb, in consideration of the sum of Five Hundred and ten

($510.00) Dollars, to me in hand paid by Samuel E. Gidney of Muskogee, Indian Territory, before the sealing and delivery of these presents, the receipt where*fore* is hereby acknowledged, and in further consideration of the delivery to me of a certain large diamond ring, and a pair of diamond ear-bobs, heretofore owned by my mother aforesaid, receipt whereof is hereby acknowledged, do hereby bargain, sell, assign, transfer, set and deliver over unto, and do hereby give, grant, bargain, sell, convey and confirm, unto the said Samuel E. Gidney, his heirs, executors, administrators and assigns, all my right, title and interest, claim and demand and estate, both in law and equity, in and to any and all of the estate, property, real, personal and mixed of whatsoever kind and wheresoever situated of the said Sarah Rawlings, deceased, which I ever had, now have, or which I or my heirs, executors, or administroat-rs at any time hereafter as heir or heirs, distributee or distributees, legatee or legatees, devisee or devisees do, can or may have in, to and of said estate of said Sarah Rawlings, deceased, with all powers and remedies for the recovery thereof.

To have and to hold: all and singular the said estate and premises with the appurtenances unto the said Samuel E. Gidney, his heirs, executors, administrators and assigns to the sole and absolute use and benefit and behoof *to* the said Samuel E. Gidney, his heirs, executors, administrators and assigns forever.

And I do hereby covenant with the said Samuel E. Gidney and his heirs, legal representatives and assigns that I have good right to sell and convey the same unto the said Samuel E. Gidney. That they are free from all incumbrances caused or suffered by me, that I will, my heirs, executors, and administrators shall warrant and defend the same to the said Samuel E. Gidney, his heirs, legal representative-, and assigns forever, against the lawful claims and demands of all persons.

In witness whereof: The said Sidney C. Chapple alias Sidney C. Bibg, to these presents has hereunto set his hand and seal this 22nd day of June, 1906.

(Signed) SIDNEY C. CHAPPLE, [SEAL.]
Alias SIDNEY C. BIBB. [SEAL.]

Signed, sealed and delivered in the presence of
D. N. FINK.
(Signed) ED. SWEENEY.

UNITED STATES OF AMERICA,
Indian Territory, Western District, ss:

On this the 22nd day of June, 1906, before me C. A. Ballantyne, a Notary Public duly commissioned and acting as such, within and for the Western District of the Indian Territory, appeared in person Sidney C. Chapple alias Sidney C. Bibb, to me personally well known as the person whose name appears upon the within and foregoing instrument as the party grantor and subscribed thereto and acknowledged to me that he had executed the same for the consideration

and purposes therein mentioned, expressed and set forth and I do hereby so certify.

In witness whereof: I have hereunto set my hand and seal as such Notary Public in the said District and Territory this the 22nd day of June, 1906.

[SEAL.] (Signed) C. A. BALLANTYNE,
Notary Public.

West Dist.

My commission expires May 13, 1909.

82 And afterward, to-wit: On the 29th day of December, 1906, the same being one of the regular days of the United States Court of the Western District of the Indian Territory, at Muskogee, the Honorable William R. Lawrence, Judge presiding, the following further proceedings were had in this cause, towit:

Equity. 6816.

SIDNEY C. CHAPPLE
vs.
SAMUEL E. GIDNEY.

And comes the plaintiff and files his motion to strike certain matters from the defendant's answer herein, said motion is attached hereto and made a part of this transcript, and is in words and figures as follows, towit:

83 In the United States Court for the Western District of the Indian Territory, at Muskogee.

#6816. Equity.

SYDNEY C. CHAPPLE and J. C. SCULLY, Plaintiffs,
vs.
SAMUEL E. GIDNEY et al., Defendants.

Motion.

Comes now the plaintiffs, Sydney C. Chapple and J. C. Scully, and move the Court to strike from the Answer of the Defendant, herein, all of paragraphs, II, III, IV and V, for the reason that the matters therein set up are not properly pleaded and constituted no defense to plaintiffs' cause of action.

Wherefore, they pray the judgment of the Court.

RAYMOND, MAXEY & RUNYON,
Attorneys for Plaintiffs.

84 And afterward, to-wit: On the 2nd day of January, 1907, the same being one of the regular days of the United States Court of the Western District of the Indian Territory, at Muskogee,

the Honorable William R. Lawrence, Judge, presiding, the following further proceedings were had in this cause, to-wit:

Equity. 6816.

SYDNEY C. CHAPPLE
vs.
SAMUEL E. GIDNEY.

And comes the defendant and files his motion for a continuance of this cause, and also his motion for leave to strike certain lines contained in paragraph 2nd of the answer, and the Court, having heard the argument of counsel, and being fully advised in the premises, does sustain said motion, and it is ordered that the following lines beginning with the 13th line on page 5, and that being 4½ lines and ending with the words this Court be, and the same are hereby, stricken out of said answer; and comes the plaintiff and moves the Court to strike out certain parts of the answer herein, and the same coming on to be heard, and the Court, having heard the argument of counsel, and being fully advised in the premises, does over-rule said motion, and it is ordered that this cause be, and the same is hereby, continued at the costs of the plaintiff; said above mentioned motion for continuance is attached hereto and made a part of this transcript and is in words and figures as follows, to wit:

85 In the United States Court for the Western District of the Indian Territory, Sitting at Muskogee.

No. 6816. Equity.

SYDNEY C. CHAPPLE and J. C. SCULLY, Plaintiffs,
vs.
SAMUEL E. GIDNEY et al., Defendants.

Comes now the defendant, Samuel E. Gidney, and moves the Court to delay the trial of the issue of devisavit vel non prayed for in this case until the trial of the issue plead by the defendant, Gidney that the plaintiff, Sydney C. Chapple has no such interest in this case as to entitle him to have the issue raised by him tried, and that that issue raised by him may be continued until the issue of interest is either tried in this suit or in the suit brought by him to set aside a transfer made by himself in which he conveys all of his interest in his mother's estate to the defendant, Gidney, as set forth in said suit, as well as in the answer of Gidney in this suit.

HUTCHINGS, MURPHY & GERMAN,
Attorneys for Defendant, Samuel E. Gidney.

86 And afterward, to-wit: On the 8th day of January, 1907, there was issued out of the office of the Clerk of the United States Court of the Western District of the Indian Territory, at

Muskogee, an alias summons in this case, directed to the Sheriff of Gordon County, Georgia, commanding him to notify certain of the defendants in this case of the filing and pendency of this action, together with the answer day thereto, which said summon-, together with the Sheriff's return endorsed thereon is attached hereto, and made a part of this transcript, and is in words and figures as follows, to-wit:

87 In the United States Court for the Western District of the Indian Territory, at Muskogee, in Chancery Sitting.

#6816.

SYDNEY C. CHAPPLE and J. C. SCULLY, Plaintiffs,
vs.
SAMUEL E. GIDNEY, CHARITY DOBBS, and SULLIVAN THORN, Defendants.

Amended Complaint.

To the Honorable William R. Lawrence, Judge of the United States Court for the Western District of the Indian Territory, at Muskogee, in Chancery Sitting:

Comes now your petitioners, Sydney C. Chapple and J. C. Scully and in compliance with an order of Court made and entered on the 4th day of December, 1906, amend their complaint so that the same shall read as follows:

Your petitioners, Sydney C. Chapple and J. C. Scully respectfully represents unto your Honor that they are citizens of the United States and residents of the Western District of the Indian Territory and that the defendants, Samuel E. Gidney and Charity Dobbs, are citizens of the Western District of the Indian Territory and that they are residents thereof and that the defendant, Sullivan Thorn resides at Senoraville, Georgia and that the nearest place of holding Court in the Western District to the residence of the defendants, Samuel E. Gidney and Charity Dobbs, is at Muskogee and that the subject matter of this suit is pending in the Probate Court of the Western District of the Indian Territory at Muskogee.

Your petitioners further represent, unto your Honor, that one Sarah Rawlings, formerly Sarah Chapple, the mother of your petitioner, Sydney C. Chapple, late of the town of Haskell, West-
88 ern District, Indian Territory, but now deceased, on or about the 23rd day of October, 1905, executed a certain instrument in writing purporting to be her last Will and Testament; and thereafterwards, to-wit, on the 16th day of June, 1906, departed this life, leaving your petitioner, Sydney C. Chapple, her only child and sole heir at law.

Your petitioners further represent, that the said Sarah Rawlings, under and by the said instrument of writing, so purporting to be her last Will and Testament, professedly bequeathes all of her estate, both real and personal, as follows:

To Sydney C. Chapple, who is one of your petitioners, $500.00, with any debt which he may be owing to the said Sarah Rawlings at the time of her death; To Samuel E. Gidney, who is one of the defendants herein, and his heirs and assigns forever, all of the rest, residue and remainder of her estate, real, personal and mixed, of whatsoever kind, and wheresoever situated, whereof, she may die seized or possessed, or have an interest in at the time of her death, which property consisted of real estate, bank stock, cash on hand and personal property of the value of Thirty Thousand Dollars or more; and thereafter, to-wit, on the 13th day of April, 1906, said Sarah Rawlings, executed an instrument in writing, purporting to be a codicil to her aforesaid purported Will and under and by said instrument of writing, so purporting to be a codicil to her purported Will aforesaid, professedly bequeathes to Charity Dobbs, the sum of Fifty Dollars and to her brother, Sullivan Thorn, of Senoraville, Georgia, all of her dresses, cloaks, clothing and such wearing apparel, as will more fully appear from the said instrument in writing, when produced in Court and a copy of same hereto attached, marked exhibit "A" and made a part of this Complaint.

Your petitioners further represent, that on the 3rd day of July, 1906, the said instrument of writing, purporting to be the last Will and Testament of the said Sarah Rawlings, was exhibited to the United States Court for the Western District of the Indian
89 Territory, at Muskogee, sitting in Probate, for probate, by the said Samuel E. Gidney, and the same was then and there probated in common form and letters testamentary thereon were granted to the defendant, Samuel E. Gidney, the person *maned* in said instrument of writing to act as executor of said purported Will, and the said Samuel E. Gidney, then and there duly qualified, and took upon himself the burden of Executor of the said supposed Will of the said Sarah Rawlings, deceased.

Your petitioners further represent, that the said Sarah Rawlings, at the time of the execution of said instrument of writing, purporting to be her last Will and Testament, was not of sound and disposing mind and memory, but on the co-trary, she was so weak and feeble from ill health and her mind and memory was so impaired as to render her wholly incapable of making any just and proper disposition of her estate.

Your petitioners fur*hte*r represent, that the defendant, Samuel E. Gidney, the principal legatee in said pretended Will, used and exercised many undue arts and fraudulent practices and resorted to falsehoods and misrepresentations to induce the said Sarah Rawlings to execute said instrument of writing and the said Sarah Rawlings in executing the same, was in fact, under improper restraint and undue influence from the arts and fraudulent practices of the defendant, Samuel E. Gidney.

Your petitioners particularly represent, that the defendant, Samuel E. Gidney, in order to induce the said Sarah Rawlings, to execute the said instrument in writing, took advantage of his confidential position and relation as attorney and legal adviser of the said Sarah Rawlings and poisoned her mind and alienated her affec-

tions from your petitioner, Sydney C. Chapple and her other relative- by false and fraudulent statements as to what he was doing for her, and how little your petitioners, Sydney C. Chapple, and her other relatives cared for her, and that he was in fact her only true friend, and in her weak and emaciated condition physically,
90 and on account of her mental condition, her mind and memory, being so impaired as to render her susceptible to his arts and fraudulent practices, the said defendant, Samuel E. Gidney, obtained such control over the mind of the said Sarah Rawlings as to render her incapacitated to know what she was doing at the time she executed the said purported Will, and by reason of the undue influence exercised over her by the said Samuel E. Gidney who was and had been for a long time prior thereto, her lawyer and confidential adviser, she was so much under his arts and influences at the time of the execution of the said instrument in writing, purporting to be her last Will and Testament, as to be incapable of doing anything other than that which he advised and but for such undue influence exercised over her by the said Samuel E. Gidney, she would not have executed the instrument purporting to be her last Will and Testament.

Your petitioners further represent that said paper which was as aforesaid admitted to probate by said United States Court for the Western District of the Indian Territory, is not the last Will and Testament of the said Sarah Rawlings.

Your petitioners further represent unto your Honor, that by reason of the said Samuel E. Gidney, through his arts and fraudulent practices aforesaid, procuring the said Sarah Rawlings, to execute said instrument of writing purporting to be her last Will and procuring the same to be admitted to probate that it so incumbered the estate of said Sarah Rawlings, which of right belongs to your petitioner, Sydney C. Chapple, that he, the said Sydney C. Chapple, was unable to obtain control or possession of any part of said estate and being poor and almost destitute of means, to prosecute an action to set aside said Will and other fraudulent conveyances procured by said Samuel E. Gidney, was compelled to procure money from some other source in order to enable him to prosecute the necessary suits to set aside said Will and other fraudulent conveyances procured by the said Samuel E. Gidney and on the 3rd day of August, 1906, he entered into a contract with his co-plaintiff, J. C. Scully,
91 whereby the said J. C. Scully agreed to employ counsel and advance the necessary moneys for prosecuting said suits in the proper Court to set aside said Will and other conveyances and in consideration thereof, said J. C. Scully is to receive one half of whatever property might be recovered in said suit, a copy of said contract is hereto attached, marked Exhibit "B."

Wherefore, the plaintiffs pray that the validity of said paper writing be determined in this action and that the same be adjudged invalid and void and that the said Sarah Rawlings died intestate and *fro* such other and further relief as may be just together with the costs of this action; that an issue devisavit vel non as to the validity of said Will, to be tried by a jury and that judgment be

rendered setting aside the probating of said Will and declaring the Will *b*oid and of no effect.

That the said Samuel E. Gidney, executor under said pretended Will be required to account for all of that portion of said estate which may have come into his hands from any source whatever and that he be required to pay to the plaintiffs herein, any moneys that may have come into his hands as executor of said estate and for all such other and further relief as to the Court may seem proper.

W. F. SCHUERMEYER AND
RAYMOND, MAXEY AND RUNYON,
Attorneys for Plaintiffs.

Certificate of True Copy.

UNITED STATES OF AMERICA,
Indian Territory, Western District, ss:

I, R. P. Harrison, Clerk of the United States Court in the Western District, Indian Territory, do hereby certify that the instrument hereto attached is a full, true and correct copy of am. compl't as the same appears from the records of my office.

Witness my hand and seal of said Court at Muskogee, in said Territory, this 8 day of Jan. A. D. 1907.

R. P. HARRISON,
Clerk and Ex-Officio Recorder.
By C. S. BUCHER,
Deputy Clerk.

92 *Summons in Equity.*

UNITED STATES OF AMERICA,
Indian Territory, Western District, ss:

The President of the United States of America to the Sheriff of Gordon County, Georgia, or any Citizen thereof:

You are commanded to summon Samuel E. Gidney, Charity Dobbs and Sullivan Thorn, to answer in sixty days after the service of this Summons upon them a complaint in equity filed against them in the United States Court for the Western District, Indian Territory, at Muskogee, by Sydney C. Chapple and J. C. Scully, and warn them that *that* upon their failure to answer, the complaint will be taken for confessed, and you will make due return of this Summons on the first day of the next April Term of said Court.

Witness, the Honorable William R. Lawrence, Judge of said Court, and the seal thereof, at Muskogee, Indian Territory, this 8th day of January, A. D. 1907.

R. P. HARRISON, *Clerk*,
[SEAL.] By C. H. BUCHER, *Deputy*.

92½ UNITED STATES OF AMERICA,
Gordon County, State of Georgia, ss:

I hereby certify that I received the within summons with copy of Amended Complaint thereto attached, on the 11th day of January, 1907, at 11:30 o'clock A. M., and that I, served the same upon the within named defendant, Sullivan Thorn, by delivering to him a true copy of said summons with a true copy of said amended complaint attached, at Sonoraville, in the State of Georgia, in said Gordon County, on the 12th day of January, 1907, at the hour of 11:30 o'clock A. M., and that the said Sullivan Thorn is personally well known to me. Other defendants not found in my county.

Dated at Calhoun, Georgia, this 12th day of January, 1907.

J. D. EVERETT, *Sh'ff.*

U. S. A., STATE OF GEORGIA,
Gordon County, ss:

Be it remembered that on this 12th day of January, 1907, personally appeared before me, a Clerk Superior Court, within and for said County and State aforesaid, duly commissioned and acting as such and duly empowered to administer oaths and take acknowledgements, J. D. Everett, Sh'f, personally well know- to me to be the person who signed the above certificate of service, and well known to me to be a person worth- of credit, and stated that the above affidavit was in all things true, and I do hereby so ceritfy.

Witness my hand and official seal, this the 12th day of January, 1907, at Calhoun, Georgia.

H. J. ROFF,
Clerk, Superior Court, Gordon County, Georgia.

93 And afterward, to-wit: On the 14th day of January, 1907, the defendant, by his attorney, filed in the office of the Clerk of the United States Court of the Western District of the Indian Territory, at Muskogee, a motion to strike parts of plaintiff's bill, which said motion is attached hereto and made a part of this transcript, and is in words and figures as follows, to-wit:

94 In the United States Court for the Western District of the Indian Territory, Sitting at Muskogee.

7040. Equity.

SYDNEY C. CHAPPLE et al., Plaintiffs,
vs.
SAMUEL E. GIDNEY et al., Defendants.

Motion.

Comes now the defendant, Samuel E. Gidney, and moves to strike out the second paragraph on page three of plaintiffs' bill in equity, commencing with the twenty-third line on said page, with the words,

"Your orators," and ending with the words, "set aside," on the 29th line thereof, being all of said second paragraph on said page three for the reason that said matter is redundant, irrelevant, immaterial, is mere surplusage, and has no relation to any issue in this cause.

II.

That all of the last paragraph on page three of plaintiffs' bill in equity, commencing with the words, "Your orators," and ending on page four of plaintiffs' bill, on the 10th line thereof, including as the last words thereof, "said estate," as irrelevant, immaterial, redundant, and mere surplusage, and having no relation to any issue in this case, be struck from said complaint in equity.

HUTCHINGS, MURPHY & GERMAN,
Attorneys for Defendant Samuel E. Gidney.

95 And afterward, to-wit: On the 1st day of April 1907, the same being one of the regular days of the United States Court of the Western District of the Indian Territory, at Muskogee, the Honorable William R. Larence, Judge presiding, the following further proceedings were had in this cause, to-wit:

Equity. 6816.

SYDNEY C. CHAPPLE
vs.
SAMUEL E. GIDNEY.

Now on this day comes the plaintiff herein and files his reply to the defendant's answer, heretofore filed herein; said reply being in words and figures as follows, to-wit:

96 In the United States Court for the Western District of the Indian Territory, at Muskogee, in Chancery Sitting.

#6816. Equity.

SYDNEY C. CHAPPLE and J. C. SCULLY, Plaintiffs,
vs.
SAMUEL E. GIDNEY et al., Defendants.

Replication.

These repliants saving and reserving unto themselves all, and all manner of advantage of exception to the manifold insufficiencies of the answer of the Defendant, Samuel E. Gidney, for replication thereunto say: That they will aver, and prove their said bill to be true, certain and sufficient, in the law to be answered unto, and that that part of said answer contained in paragraph II is untrue in this to-wit:

That the alleged conveyance, set out in said paragraph II, as made

by the plaintiff Sydney C. Chapple on the 22nd day of June 1906 was obtained from him by the said Samuel E. Gidney by fraud and mis-representation in this; that the said Samuel E. Gidney at the time of the execution of said conveyance, and before the same was executed, represented to the said Sydney C. Chapple that Sarah Rawlings, the mother of said Sydney C. Chapple, had made a will wherein she had dis-inherited him, the said Sydney C. Chapple, and conveyed, devised, and bequeathed all of her property of every kind and character to the said Samuel E. Gidney; that the said Gidney represented at the time that the said Sarah Rawlings left very little property. That she had made some bad investments, and that she owed some very heavy bills, including an indebtedness $5,000.00. Five Thousand Dollars, for money which he, Gidney, had loaned her, and for his services; that after the debts were paid there
97 would be very little left, probably not enough to pay his, Gidney's fees for services rendered; that there would not be more than $700.00 to $1,000.00, at the outside left after the payment of the debts; that the Bank stock owned by her was worth $1700.00. That the total estate, not counting the debts, would not be worth more than Six or Seven Thousand Dollars.

That the will was a good will in law, and the plaintiff could not defeat the will, and if he did he could not get as much out of the estate, after paying his lawyers, as $500.00.

That he, Gidney, would not have the advantage of plaintiff in any suit to set aside the will, because being a lawyer, he could conduct the case without expense. That with reference to the interest that was still in the hands of the Administrator in Texas, it was not certain whether the Rawling heirs would not come in.

That plaintiff says that for a long time prior to the death of said Sarah Rawlings, the said Sydney C. Chapple had been absent from his mother's home, and knew nothing whatever about her property rights, or her financial condition and knew that said defendant Samuel E. Gidney had been his mother's legal adviser for sometime, and was familiar with her estate and financial condition, the said Sydney C. Chapple believed the statements of the said Samuel E. Gidney aforesaid to be true, and acted upon such representations, and because of his belief in same, he executed said instrument of writing set out as exhibit "A" to defendant's answer.

Plaintiff alleges that such representations were not true, and were known to the said Gidney to be untrue, and were fraudulently made with a view to induce plaintiff to sign said deed of conveyance, and execute said release. That the estate was in trueth worth, at least Thirty Thousand Dollars ($30,000.00) above all indebtedness. That the Bank stock referred to was worth between Four and Five Thousand Dollars; that the said Gidney, had not loaned the said Sarah Rawlings $5,000.00, and she was not indebted to him in such sum; that the interests in the hands of the Administrator in
98 Texas were not in debt nor liable to be obtained by the Rawlings heirs. That the said Gidney had been paid a sum more than sufficient to compensate him for the services rendered by him.

The said Gidney further represented that if plaintiff should con-

test the will, it would take three or four years to bring the matter to such stage that the plaintiff Sydney C. Chapple could get any money upon his Mother's estate.

That during this conversation plaintiff requested a diamond ring, and a pair of diamond ear bobs that belonged to his mother in her life time, and these the defendant agreed to let him have, and subsequently delivered to him. That by reason of these false and fraudulent misrepresentations, relied upon by plaintiff, and because of his ignorance of the frauds perpetrated by said Gidney in procuring said will as hereinafter set out, and because of his ignorance of his rights by reason of the fraudulent concealments hereinafter set out, plaintiff executed the said deed of conveyance and the instrument of release set up by defendant Samuel E. Gidney.

These plaintiffs further aver that soon after the said Samuel E. Gidney became the attorney and confidential adviser of said Sarah Rawlings, he discovering her weak mental condition, and also that she was susceptible, to his influence, and learning that she had a large estate, set about to get possession of all her property and by his artifices and frauds and his influence over her induced her to execute various instruments consisting of power of attorney, deed to a part of her property in the State of Texas, and in furtherance of his schemes to acquire all of her estate and defraud her *only*, Sydney C. Chapple, out of his just rights in the premises and using the great influence he possessed over the said Sarah Rawlings, in her weakened condition, physically and mentally, induced her to execute said pretended will, leaving all of her property to him, and it was in furtherance of his fraudulent, base, and wicked design, to acquire said estate, that he fraudulently represented to said Sydney C. Chapple that his mother -- would only amount to a few hundred dollars, and by such fraudulent means induced the said
99 Sydney C. Chapple to execute said conveyance.

Plaintiff further avers that at the time the said Samuel E. Gidney induced the said Sydney C. Chapple to execute said conveyance, he was perfectly familiar with the estate of the said Sarah Rawlings, and knew *that* the statements and representations he made to the said Sydney C. Chapple to be false and well knew that said estate was worth thirty or forty thousand dollars; that Sydney C. Chapple was young and inexperienced and wholly ignorant of the law at the time of the execution of the said instrument, and was over-reached by the said Gidney by reason of the confidence said Chapple had in him and his fraudulent representations.

Plaintiffs further aver that at the time the plaintiff, Sydney C. Chapple, made the alleged conveyance, set out in paragraph two of defendant's answer, the defendant well knew that the plaintiff's mother, Sarah Rawlings, at the time of the execution by her of the will whose validity is in question herein, lacked testamentary capacity, and was mentally incapable of making a valid will; that said defendant also well knew of her weakened physical condition, and of her inability to resist the suggestions and influence of those about her. And well knew that he had taken advantage of her mental incapacity, her weakened condition, and her susceptibility to influence

as above set out, and of the influence which he had over her, by reason of his being her attorney and legal adviser, which influence became great and irresistable, to unduly influence said Sarah Rawlings to make the will aforesaid, and to disinherit said plaintiff, Sydney C. Chapple, and to make the defendant beneficiary in said will; that the facts recited were the cause of the youth, inexperience, lack of knowledge and absence from home much of the time preceding his mother's death, not known to the plaintiff Sydney C. Chapple, though well known to the defendant that plaintiff, Sydney C. Chapple, by reason of the facts, supposed that the will so executed was a valid instrument, and that he was without right to his mother's estate; that the defendant in pursuance of his settled and continuing purpose to defraud the plaintiff Sydney C. Chapple, by
100 procuring from his mother, by unlawful means, and in the absence of testamentary capacity on her part, a will in defendant's favor, and to cure the vices and defects in such will by obtaining a conveyance of his interest, from the plaintiff, Sydney C. Chapple, and by inducing on his part other acts that could be plead as acts of estoppel; knowingly and fraudulently withheld and concealed from the plaintiff, Sydney C. Chapple, the facts within the knowledge of the said defendant, as above set out, and induced the plaintiff to make said conveyance under the impression that will aforesaid was valid, and that the said plaintiff was without right, in or to his mother's estate, except as therein provided.

Plaintiffs further aver that, at the time of the execution of said conveyance, on the 22nd day of June, 1906, the said Samuel E. Gidney had, in his hands, money belonging to the estate of said Sarah Rawlings, which he had collected for the said Sarah Rawlings, largely in excess of the five hundred and ten dollars paid him, and that the same was the money of the plaintiff, Sydney C. Chapple, and not the money of said Samuel E. Gidney; and that the diamond ring and the diamond ear-bobs were the property of the said Sydney C. Chapple, and not the property of the said Samuel E. Gidney, and for that reason the said Samuel E. Gidney did not pay him anything, but, on the contrary, there was a total failure of consideration for said conveyance, and the said Sydney C. Chapple is not, therefore, compelled to return said money, diamond, ring, and ear-bobs.

Plaintiffs for replication to the fourth paragraph of the plaintiff's answer, say that it is not true that Sydney C. Chapple, on the 22nd day of June, 1906, executed and delivered to the defendant, Samuel E. Gidney, as executor of said will, a written receipt and release and acquittance as such devisee and legatee, and received therefor a consideration of five hundred dollars, but plaintiffs aver the facts to be that, there was no consideration whatever, of any kind or char-
act*h*er, paid to Sydney C. Chapple for said pretended release,
101 and that same was obtained from him by said Samuel E. Gidney at the same time the said other conveyance mentioned was obtained and under the same false and fraudulent representations and concealments, as above set forth, and in pursuance and as part of his base and wicked design to cheat and defraud said Sydney C. Chapple out of his just rights in the premises, by means of the

invalid will, procured from his mother; and, if this fail, by means of the deed of conveyance aforesaid, and by means and acts of ratification and estoppel which the said defendant might set up against said plaintiff, because of his receiving money provided in said will, and his execution of the instrument of release above set out; all of which things were done when the plaintiff was in ignorance of material facts effecting his rights, which were known to defendant Gidney; and when plaintiff was in error as to what his lawful rights were because of his ignorance of such facts.

Plaintiffs for further replication deny that the contract entered into between the plaintiff, Sydney C. Chapple, and his co-plaintiff, J. C. Scully, set out in their amended complaint herein, is void and of no force and effect, for the reason that it is champertous and against the policy of the law, but aver the fact to be by reason of the fraudulent practices of the said Samuel E. Gidney, in depriving the plaintiff, Sydney C. Chapple, of the possession or control of the estate of said Sarah Rawlings, which of right belongs to him, he made said contract with said J. C. Scully, for the purposes of acquiring money to support himself and family and prosecute suits against the defendant, Samuel E. Gidney, to set aside the will and other fraudulent conveyances procured by said Samuel E. Gidney, and that he has filed his suit in the District Court of Dallas County, Texas, to set aside the conveyance set out as exhibit "A" to defendant's answer, said suit being filed on the 17th day of August, 1906; and that he has also, filed in this court, a suit to set aside said conveyance, set out as exhibit "A" to defendant's answer, so far as effects the property in this jurisdiction; that said suits have
102 not been tried for the reason that they have not been reached for trial; that the same were filed in good faith and will be prosecuted to judgment as soon as practicable.

Plaintiffs for further replication to the answer of defendant, setting up that the contract between J. C. Scully, and plaintiff, Sydney C. Chapple, is champertous and void, alleges that if such is the effect of said contract, it inures to the benefit of plaintiff as against the said J. C. Scully, and not to the benefit of the defendant Gidney. That the said Scully was made a party to this proceeding upon the motion of the defendant, Gidney, and his right under said contract disclosed and plead at the instance of said defendant, and that said defendant Gidney, can not thus compel the joiner of another party in interest with the plaintiff, Sydney C. Chapple, and then defeat plaintiff's right to recover because of the right between him and such other persons, and that the defendant, Gidney compels the joiner of said Scully as a party in interest, necessary for the protection of the said defendant, Gidney. He is estopped to question his interest or to set up the mode of his acquisition against the plaintiff, Sydney C. Chapple; all of which matters and things these plaintiffs are willing and will be ready to aver, and prove as this Honorable Court shall direct, and pray judgment as in their bill they have already prayed.

Plaintiffs say that, if it should develop, upon the hearing, that the five hundred and ten dollars, received by plaintiff, Sydney C. Chap-

ple, from the defendant, Gidney, was not money belonging to the estate of Sarah Rawlings, but was, in truth, the money of the defendant Gidney, that plaintiffs are willing to do equity, and will upon the establishment of such facts by this Court repay such money, with interest, to the said Gidney; and are willing to give relief awarded them by the court, subject to such repayment within the time fixed by the Court.

LEWIS & PHILLIPS,
W. F. SCHUERMEYER,
RAYMOND, MAXEY & RUNYON,
Att'ys for P'tiff-.

103 And afterward, to-wit: On the 23rd day of April, 1907, there was filed in the office of the Clerk of the United States Court for the Western District of the Indian Territory, at Muskogee, two motions by the defendant, Gidney, in regard to certain depositions taken in this case, which said motions are attached hereto and made a part of this transcript, and are in words and figures as follows, to-wit:

104 In the United States Court for the Western District of the Indian Territory, Sitting at Muskogee.

No. 6816. Equity.

(To be used also in No. 7040, Equity.)

SYDNEY C. CHAPPLE and J. C. SCULLY, Plaintiffs,
vs.
SAMUEL E. GIDNEY et al., Defendants.

Comes now the defendant, Samuel E. Gidney, and excepts to the deposition of Charles F. Clint filed in the above entitled action for the reason that said deposition has been materially altered since the taking thereof by striking out certain portions of the deposition and inserting and interpolating new matter therein, which is more fully shown by reference to the deposition on file in said case No. 6816, whereby the deposition taken of said witness is not the deposition that appears now on file, and said deposition is not the deposition of the said witness, and that said changes were made without the knowledge or consent of this defendant, and were made after said deposition was taken.

This motion is supported by the affidavit of Samuel E. Gidney, which, by reference thereto, is made a part of these exceptions.

HUTCHINGS, MURPHY & GERMAN,
Attorneys for Defendant Samuel E. Gidney.

105 In the United States Court for the Western District of the Indian Territory, Sitting at Muskogee.

No. 6816.

SYDNEY C. CHAPPLE and J. C. SCULLY, Plaintiffs,
vs.
SAMUEL E. GIDNEY, Defendants.

Samuel E. Gidney being first duly sworn, deposes and says that he is one of the defendants in the above styled action, and that he was present at the examination of W. J. J. Smith and of Charles F. Clint, at the time they made their depositions herein before E. E. Gibson, a Notary Public in Dallas County, Texas, and that the said E. E. Gibson took their statements in shorthand and afterwards reduced the same to typewriting; that said Samuel E. Gidney was not present at the time that said shorthand notes were reduced to typewriting, and that he was later furnished a carbon copy of the same, and that by a comparison of the same with the deposition- herein filed he finds that they are not the same for the reason that erasures and interlineations have subsequently been made in the typewritten form of the aforesaid depositions, and the same is evidenced by the depositions themselves; that the said Samuel E. Gidney did not consent to any of the erasures, changes or any interlineations therein, and that they were made without his knowledge or consent.

SAMUEL E. GIDNEY.

Subscribed and sworn to before me this 23 day of April, 1907.

A. W. FITE, JR.,
Notary Public.

My commission expires Dec. 4th. 1910.

106 In the United States Court for the Western District of the Indian Territory, Sitting at Muskogee.

No. 6816. Equity.

(To be used also in No. 7040, Equity.)

SYDNEY C. CHAPPLE and J. C. SCULLY, Plaintiffs,
vs.
SAMUEL E. GIDNEY et al., Defendants.

Comes now the defendant, Samuel E. Gidney, and excepts to the depositions of W. J. J. Smith filed in the above entitled action for the reason that said deposition has been materially altered since the taking thereof by striking out certain portions of the deposition and inserting and interpolating new matter therein, which is more fully shown by reference to the deposition on file in said case No. 6816,

whereby the deposition taken of said witness is not the deposition that appears now on file, and said deposition is not the deposition of the said witness, and that said changes were made without the knowledge or consent of this defendant, and were made after said deposition was taken.

This motion is supported by the affidavit of Samuel E. Gidney, which by reference thereto is made a part of these exceptions.

HUTCHINGS, MURPHY & GERMAN,
Attorneys for Defendant Samuel E. Gidney.

107 And afterward, to-wit: On the 19th day of December, 1910, the same being one of the regular days of the November, 1910, Term of the District Court of Muskogee County, Oklahoma, the Honorable Charles Bagg, Judge presiding, the following further proceedings were had in this cause to-wit:

108 In the District Court in and for Muskogee County, State of Oklahoma.

No. 6816.

SYDNEY C. CHAPPLE and J. C. SCULLY, Plaintiffs,
vs.
SAMUEL E. GIDNEY et al., Defendants.

Motion to Transfer to Superior Court.

Now come the plaintiffs, by their attorneys, and move the Court to transfer this cause to the Superior Court of Muskogee County for trial and for an order directing the Clerk of this Court to transmit all of the original papers in said cause together with the transcript of the proceedings had in this Court to the Superior Court of Muskogee County.

YANCEY LEWIS,
MAXEY & RUNYAN,
W. F. SCHUERMEYER,
Attorneys for Plaintiffs.

And the Court having heard the motion and argument of counsel thereon and being well and sufficiently advised in the premises, enters an order herein transferring this cause to the Superior Court of Muskogee County, Oklahoma, for further proceedings, which said order of court is in words and figures as follows, to-wit:

109 In the District Court in and for Muskogee County, State of Oklahoma.

No. 6816.

SYDNEY C. CHAPPLE and J. C. SCULLY, Plaintiffs,
vs.
SAMUEL E. GIDNEY et al., Defendants.

Order of Court.

Now, on this 19th day of December, 1910, come the plaintiffs above named, by their attorneys, and move the Court to transfer this cause to the Superior Court of Muskogee County for trial and the Court having examined said motion and being sufficiently advised in the premises.

It is hereby ordered and adjudged that this cause be, and same is hereby transferred to the Superior Court of Muskogee County, Oklahoma, for trial and the Clerk of this Court is hereby ordered and directed to transmit all of the original papers in this cause together with the transcript of the proceedings had in this Court in this cause to the Superior Court of Muskogee County, Oklahoma, without delay.

CHAS. BAGG, *Judge.*

110 And thereafter, to wit, on the 20th day of December, 1910, there *is* filed in the office of the Clerk of the Superior Court of Muskogee County, Oklahoma, a transcript which among other things includes the above and foregoing instruments and proceedings to which is attached the following certificate.

STATE OF OKLAHOMA,
County of Muskogee, ss:

In the District Court for the Third Judicial District, Muskogee County, Oklahoma.

No. 6816. Equity.

SYDNEY C. CHAPPLE et al.
vs.
SAMUEL E. GIDNEY et al.

I, W. P. Miller, Clerk of the District Court for the Third Judicial District, Muskogee County, Oklahoma, do hereby certify the above and foregoing to be a full, true, correct and complete transcript of all the record and proceedings together with all original papers filed in the above entitled cause heretofore pending in this Court and I further certify that the costs accrued in this case, in this Court *to* amount to the sum of $19.70 *Dollars.*

In witness whereof, I hereunto set my hand and affix the seal of said District Court this 20th day of December, A. D. 1910.

[SEAL.]

W. P. MILLER,
Clerk of the District Court.

On the back of the said transcript appears the following endorsement: Number 1173, Sydney C. Chapple et al., vs. Samuel E. Gidney, et al. Transcript. State of Oklahoma, County of Muskogee, Filed Dec. 20, 1910, Robert Toomer, Clerk of Superior Court.

111 In the Superior Court of Muskogee County, Oklahoma.

No. 1173.

SYDNEY C. CHAPPLE and J. C. SCULLY, Plaintiffs,
vs.
SAMUEL E. GIDNEY, CHARITY DOBBS, and SULLIVAN THORN, Defendants.

Journal Entry.

And now on this the 24th day of February, 1911, the above entitled matter coming on to be heard in open court.

And comes the defendant, Samuel E. Gidney, and moves the Court for leave to withdraw his answer heretofore filed herein to the amended complaint of the plaintiffs which is, by the Court granted, to which the plaintiffs except.

And comes now the defendant, Samuel E. Gidney, and files his demurrer to the amended complaint of the plaintiffs heretofore filed in this action, and the Court after having considered the same doth sustain the said demurrer to which the plaintiffs except.

And now comes the plaintiffs, by their attorneys, and pray leave of Court to file their second amended complaint herein which is allowed.

And it is ordered by the Court that the same be filed within thirteen days from this date.

FARRAR L. McCAIN,
Judge of said Court.

112 In the Superior Court of Muskogee County, Oklahoma.

SIDNEY C. CHAPPLE et al., Plaintiffs,
vs.
SAMUEL E. GIDNEY, Defendant.

Demurrer.

Comes now the defendant and files this, his demurrer to the complaint of the plaintiffs, and for grounds therefor, states:

First. That said complaint does not state facts sufficient to constitute an equitable cause of action.

Second. Because the court in which this suit was originally instituted did not have jurisdiction to try this case, nor has this court to which said case has been transferred.

Third. Because the United States Court for the Western District of the Indian Territory, in which this suit was originally instituted, could only try the issues involved in this case on its probate side, and did not have jurisdiction to try, and could not try, the issues involved in this complaint on the equity side of its docket.

HUTCHINGS, MURPHY & GERMAN,
Attorneys for Defendant.

113 In the Superior Court of Muskogee County, Oklahoma, the Sussessors to the United States Court for the Western District of the Indian Territory, at Muskogee.

No. 1173.

SYDNEY C. CHAPPLE and J. C. SCULLY, Plaintiffs,
vs.
SAMUEL E. GIDNEY, CHARITY DOBBS and SULLIVAN THORN, Defendants.

Plaintiffs' Second Amended Complaint.

Come now your petitioners, Sydney C. Chapple and J. C. Scully, and after leave of Court being first duly had and obtained, file this their second amended complaint so that the same shall read as follows:

Your petitioners, Sydney C. Chapple and J. C. Scully, respectfully represent that they are citizens of the United States and residents of Muskogee County, Oklahoma, formerly a part of the Western District of the Indian Territory under the laws of the United States and that the defendants, Samuel E. Gidney, and Charity Dobbs, are citizens of the County of Muskogee, Oklahoma, formerly a part of the Western District of the Indian Territory, and that the defendant, Sullivan Thorn, resides at Senoraville, Georgia, and that the nearest place of holding Court in the said Western District to the residence of the defendants, Samuel E. Gidney and Charity Dobbs, on the 18th day of August, 1906, was at Muskogee, and that this suit and the subject matter thereof was pending in the United States Court of the Western District of the Indian Territory, at Muskogee, at the time of the admission of Oklahoma into the Union as a State.

Your petitioners further represent that one, Sarah Rawlings, formerly Sarah Chapple, the mother of your petitioner, Sydney C. Chapple, late of the town of Haskell, Western District Indian Territory, but now deceased, on or about the 23rd day of October, 1905, executed a certain instrument in writing purporting
114 to be her last will and Testament; and thereafterwards, towit, on the 16th day of June, 1906, departed this life, leav-

ing your petitioner, Sydney C. Chapple, her only child, sole heir at law.

Your petitioners further represent, that the said Sarah Rawlings, under and by the said instrument of writing, so purporting to be her last Will and Testament, professedly bequeathed all of her estate, both real and personal, as follows:

To Sydney C. Chapple, who is one of your petitioners, $500.00, with any debt which he may be owing to the said Sarah Rawlings at the time of her death; to Samuel E. Gidney, who is one of the defendants herein, and his heirs and assigns forever, all of the rest, residue and remainder of her estate, real, personal and mixed, of whatsoever kind, and wheresoever situated, whereof, she may die seized or possessed, or have an interest in at the time of her death, which property consisted of real estate, bank stock, cash on hand and personal property of the value of Thirty Thousand Dollars or more; and thereafter, to-wit, on the 13th day of April 1906, said Sarah Rawlings, executed an instrument in writing, purporting to be a codicil to her aforesaid purported Will and under and by said instrument of writing, so purporting to be a codicil to her purported Will aforesaid, professedly bequeathes to Charity Dobbs, the sum of Fifty Dollars, and to her brother, Sullivan Thorn, of Senoraville, Georgia, all of her dresses, cloaks, clothing and such wearing apparel, as will more fully appear from a copy of same hereto attached, marked exhibit "A" and made a part of this second amended complaint.

Your petitioners further represent, that the said Sarah Rawlings, at the time of the execution of said instrument of writing, purporting to be her last Will and Testament, was not of sound and disposing mind and memory, but on the contrary, she was so weak and feeble from ill health and her mind and memory was so impaired as to deprive her of testamentary capacity and render her wholly incapable of making any just and proper disposition of her estate; that her will power was entirely gone and she was wholly unable to resist the suggestion of any person about her whom she regarded as her friend.

Your petitioners further represent, that the defendant, Samuel E. Gidney, the principal legatee in said pretended Will, used and exercised many undue arts and fraudulent practices and resorted to falsehoods and misrepresentations to induce the said Sarah Rawlings to execute said instrument of writing and the said Sarah Rawlings in executing the same, was in fact, completely under improper restraint and undue influence from the arts and fraudulent practices of the defendant, Samuel E. Gidney; that said Gidney pretended to sympathize with her over her unhappy life, condoled with her in her recital of woes, gave her assiduous attentions and unusual and unprofessional services.

Your petitioners particularly represent, that the defendant, Samuel E. Gidney, in order to induce the said Sarah Rawlings to execute the said instrument in writing, took advantage of his confidential position and relation as attorney and legal adviser of the said Sarah Rawlings and poisoned her mind and alienated her affections from your petitioner, Sydney C. Chapple, and her other relatives, by false and fraudulent statements as to what he was doing for her, and how

little your petitioner, Sydney C. Chapple and her other relatives cared for her, and that he was in fact her only true friend, and in her weak and emaciated condition physically, and on account of her mental condition, her mind and memory, being so impaired as to render her susceptible to his arts and fraudulent practices, the said defendant, Samuel E. Gidney, obtained such control over the mind of the said Sarah Rawlings as to render her incapacitated to know what she was doing at the time she executed the said purported Will, and by reason of the undue influence exercised over her by the said Samuel E. Gidney, who was and had been, for a long time prior thereto, her lawyer and confidential adviser, she was so much under his arts and influences at the time of the execution of the said instrument in writing, purporting to be her last Will and Testament, as to be incapable of doing anything other than that which
116 he advised, and but for such undue influence exercised over her by the said Samuel E. Gidney, she would not have executed the instrument purporting to be her last Will and Testament.

Your petitioners further represent that said paper which was admitted to probate by said United States Court for the Western District of the Indian Territory, is not the last Will and Testament of the said Sarah Rawlings.

Your petitioners further represent that by reason of the said Samuel E. Gidney, through his arts and fraudulent practices aforesaid, procuring the said Sarah Rawlings to execute said instrument of writing purporting to be her last will, and procuring the same to be admitted to probate that it so incumbered the estate of said Sarah Rawlings, which of right belongs to your petitioner, Sydney C. Chapple, that he, the said Sydney C. Chapple, was unable to obtain control or possession of any part of said estate and being poor and almost destitute of means, to prosecute an action to set aside said Will and other fraudulent conveyances procured by said Samuel E. Gidney, was compelled to procure money from some other source in order to enable him to prosecute the necessary suits to set aside said Will and other fraudulent conveyances procured by the said Samuel E. Gidney and on the 3rd day of August, 1906, he entered into a contract with his co-plaintiff, J. C. Scully, whereby the said J. C. Scully agreed to employ counsel and advance the necessary moneys for prosecuting said suits in the proper court to set aside said Will and other conveyances and in consideration thereof, said J. C. Scully is to receive one half of whatever property might be recovered in said suit, a copy of said contract is hereto attached marked Exhibit "B."

Your petitioners further represent that on the 3rd day of July, 1906, the said instrument of writing, purporting to be the last Will and Testament of the said Sarah Rawlings, was exhibited to the United States Court for the Western District of the Indian Territory, at Muskogee, for probate, by the said Samuel E. Gidney, and the same was then and there probated in common form and letters testamentary thereon were granted to the defendant, Samuel E.
117 Gidney, the person named in said instrument of writing, to act as executor of the said purported Will, and the said Samuel E. Gidney then and there qualified, and took upon himself the

burden of executor of the said supposed Will of the said Sarah Rawlings, deceased.

That at the time said Will was probated, as aforesaid, the plaintiff, Sidney C. Chapple, resided out of that portion of Oklahoma which at that time was Indian Territory, and was not personally served with process and such action attempting to probate such Will was taken without his actual appearance and the said Sydney C. Chapple did not in any manner or form enter his appearance in said proceedings and was not a party thereto.

That as the said Sydney C. Chapple was absent from that portion of the State of Oklahoma, which was at that time Indian Territory and was not personally served with process and such action was taken without his actual appearance and as he, the said Sydney C. Chapple, did not in any manner or form enter his appearnce in said proceedings and was not a party thereto, although the said purported Will was only probated in common form and the same never offered for probate in solemn form, he should be permitted to maintain this suit to set aside the said purported Will and cancel the probate thereof in this action, and the issue of devisavit vel non tried, even though no appeal was attempted to be taken from the said probate in common form, as the original complaint herein was filed within the statutory period of three years from the date of the said probate, to-wit, on the 18th day of August, 1906.

Your petitioners further represent, that in the event that this Court should decide that this plaintiff, Sydney C. Chapple, could not maintain an action to set aside the said Will and cancel its probate, even though at the time the said purported Will was offered for probate, he was a non-resident of that portion of the State of Oklahoma, which was Indian Territory and was not personally served with process and such action was taken without his actual appear-
118 ance and he did not in any manner or form enter his appearance in said proceedings and was not a party thereto, for the reason that an appeal was not taken from the said probate, that this proceeding should be taken and considered as an appeal from the probate of the said purported Will made by the said United States Court for the Western District of the Indian Territory, at Muskogee, and this cause tried as upon an appeal and the issue of devisavit vel non heard herein, on appeal.

That at the time of the probate of the said purported Will by the United States Court for the Western District of the Indian Territory, at Muskogee, there existed only one Court presided over by one Judge in the said Western District of the Indian Territory, which said Court was denominated, The United States Court for the Western District of the Indian Territory; that there was no separate and distinct Court of Probate and no separate and distinct Court of Equity, and that the same Court and the one Judge thereof performed all the duties and functions of a Court in Probate and of a Court sitting in Chancery; that no separate Probate Court for counties existed as there were no counties and that no statutory provision existed in said jurisdiction for an appeal from a Probate Court to a Court of Chancery and no procedure provided by which an appeal could be taken.

That at the time of the probating of the said purported Will, an appeal could not be taken from the said probate thereof, for the reason that there was no separate and distinct Court of Chancery to which to take an appeal and an appeal from one Court to the other could not be taken for the reason that at that time there was only one Court in existence in the said Western District, and the said plaintiff, Sydney C. Chapple, was thereby precluded from attempting to take such an appeal.

That in the event that this Court should decide that this proceeding should not be treated as an appeal from the probate of the said purported Will and in the further event that this Court should decide that the plaintiff, Sydney C. Chapple, could not maintain this action to set aside the said purported Will and to cancel the
119 probate thereof for the reason that an appeal from the original probate thereof had not been taken, that in that event, these petitioners allege that the said Sydney C. Chapple is interested in the probate of the said purported Will and that he filed his original complaint in this action within five years after the probate thereof in the United States Court for the Western District of the Indian Territory, at Muskogee, which said Court corresponded and was similar to the Circuit Court of a County in the State of Arkansas, in which said complaint he prayed that such Will be rejected and asked the said United States Court for the Western District of the Indian Territory, to direct an issue to try the validity of such purported Will and that therefore this Court as the successor of the said United States Court for the Western District of the Indian Territory, at Muskogee, should hereunder direct that the said issue of the validity of such purported Will be at this time tried.

Your petitioners by way of a supplemental complaint allege that since the filing of the original complaint in this cause the following proceedings have been had in another action involving the same issue as that involved in this cause, namely: that on the 30th day of October, 1906, the plaintiffs in this action, filed a suit in the United States Court for the Western District of the Indian Territory, at Muskogee, against Samuel E. Gidney, one of the defendants herein, which said cause was entitled Sydney C. Chapple and J. C. Scully, plaintiffs, versus Samuel E. Gidney, defendant, No. 7040 on the docket of the United States Court for the Western District of the Indian Territory, at Muskogee; that thereafter the District Court of Muskogee County, Oklahoma, became the successor of the said United States Court for the Western District of the Indian Territory, at Muskogee, and succeeded thereby to said cause; that the said action, No. 7040, as aforesaid, was between the same parties, except that the defendants herein, Charity Dobbs and Sullivan Thorn, both of whom were duly served with process in this action and
120 neither of whom plead, answered or demurred herein and default has been regularly entered against each of the said Charity Dobbs and Sullivan Thorn, herein, did not appear thereto, and involved the same subject matter as this suit, and that the issue of the validity of the purported Will sought to be canceled and set aside in this cause, was raised therein and was an issue in said action, and that the said action, No. 7040, as aforesaid, was tried

before the District Court of Muskogee County, Oklahoma, and a decree and judgment rendered therein on the 27th day of June, 1908, in which it was found, among other findings:— "That the Will executed by said Sarah Rawlings on the 23rd day of October, 1905, in which she virtually disinherited her son, Sydney C. Chapple, and left her estate to the defendant, Samuel E. Gidney, is void for the reason that the said Sarah Rawlings did not have sufficient testamentary capacity at the time of executing the same to make a fair and intelligent disposition of her estate."

And it was therefore decreed in said judgment and decree that the issues therein be in favor of the plaintiff; that said judgment and decree was appealed from in proper form by the said defendant, Samuel E. Gidney, therein, to the Supreme Court of the State of Oklahoma; that thereafter on the 12th day of July, 1910, the said Supreme Court of the State of Oklahoma, affirmed the said judgment and decree; and that a mandate issued therefrom to the said District Court of Muskogee County, Oklahoma, and the same was thereafter spread of record in the said District Court of Muskogee County, Oklahoma; that by the said judgment and decree it was adjudicated that the said Sarah Rawlings did not have testamentary capacity on October 23, 1905, at the time the said purported Will was executed and that the same was void and should therefore be cancelled; that as between the parties hereto, the same is a final adjudication of the issue and that the defendant, Samuel E. Gidney, cannot be heard at this time to deny that the said purported Will is void and that the said Sarah Rawlings did not have testamentary capacity at the time of the execution thereof; that in the event that this Court should decide that the said findings is a final adju-
121 dication of the issue involving the validity of the said Will, that this Court should enter an order herein setting aside the same and cancelling the probate thereof without a further trial of this cause upon the facts.

That copies of the plaintiffs' amended complaint in said cause, No. 7040, and the defendant's answer thereto and of the judgment and decree entered therein are hereto attached and marked Plaintiffs' Exhibit "C," "D" and "E," respectively, and made parts hereof.

Wherefore, the plaintiffs pray that this Court find that there has been a final adjudication as to the validity of the Will executed by Sarah Rawlings on October 23, 1905, in cause No. 7040 on the docket of the District Court of Muskogee County, Oklahoma, and that therefore the said Will is invalid and void and that the said Sarah Rawlings died intestate and that the said Will and the probate thereof be cancelled and set aside.

And in the event that this Court does not so find, then these plaintiffs further pray, that this action be treated and considered as an appeal from the probating of the said purported Will, in common form, by the United States Court for the Western District of the Indian Territory, at Muskogee, and that an issue devisavit vel non be made and tried by a jury, de novo, as on appeal, and that judgment be rendered setting aside the probating of the said Will, in common form, and declaring the said Will void and of no effect, and refusing its probate in solemn form.

And in the event that this Court should find that this action should not be treated as an appeal from the probate of the said purported Will in common form, that then in that event, these plaintiffs further pray, that the validity of said paper writing purporting to be the last Will and testament of Sarah Rawlings be determined in this action, as on a contest of said purported Will, in Chancery, and that the same be adjudged invalid and void and that the said Sarah Rawlings died intestate, and for such other and further relief as may be just, together with the costs of this action; that an issue devisavit vel non be made, to be tried by a jury, and that judgment be ren-
122 dered setting aside the probating of said Will and declaring the Will void and of no effect; that the said Samuel E. Gidney, executor under said pretended Will, be required to account for all that portion of said estate which may have come in to his hands, from any source whatever, and that he be required to pay to the plaintiffs herein any moneys that may have come into his hands, as executor of said estate, and for all such other and further relief as to the Court may seem proper.

YANCEY LEWIS,
N. B. MAXEY,
W. F. SCHUERMYER,
CHAS. F. RUNYON,
Attorneys for Plaintiffs.

STATE OF OKLAHOMA,
Muskogee County, ss:

J. C. Scully, being sworn, states that he is one of the plaintiffs in the above entitled cause; that he has read the foregoing amended complaint and knows the contents thereof and that the same are true as he verily believes.

J. C. SCULLY.

Subscribed and sworn to before me this 4th day of March, 1911.
G. G. JOHNSON,
Notary Public.

My commission expires Aug. 6, 1913.

123 Omitting Caption.

Amended Complaint.

To the Honorable William R. Lawrence, Judge of the United States Court for the Western District of the Indian Territory, at Muskogee, in Chancery Sitting:

Come now plaintiffs, Sidney C. Chapple and J. C. Scully, and by leave of the Court amend their complaint so that the same shall read as follows:

Plaintiffs, Sidney C. Chapple and J. C. Scully, of the Western District of the Indian Territory, respectfully represents unto Your

Honor that the defendant, Samuel E. Gidney, is a resident of the Western District of the Indian Territory, and that the subject matter of this suit is situated in the Western District of the Indian Territory.

Plaintiffs further represent that the plaintiff, Sidney C. Chapple, was and is the sole heir-at-law of Sarah Rawlings, deceased, formerly Sarah Craig, and that prior to her marriage with H. H. Rawlings the said Sarah Rawlings was the wife of Edward Chapple, now deceased, who was the father of the plaintiff, Sidney C. Chapple, as the said Sarah Rawlings was his mother, and that said Sarah Rawlings departed this life on or about the 16th day of June, 1906, at Haskell, in the Western District of the Indian Territory, of which she was a resident; that she died intestate, leaving as her sole heir-at-law the plaintiff, Sidney C. Chapple.

Plaintiffs further represent that at the time of the death of the said Sarah Rawlings she was seized and possessed of a large amount of real estate and personal property, consisting of farm lands in Ellis County, Texas, of the value of ten thousand dollars ($10,000.00); also farm lands in Scurry County, Texas; Fisher County, Texas; Nolan County, Texas, and Reeves County, Texas, of the value of, at least, fifteen thousand dollars $15,000.00; also town lots in the towns of Pecos and Dallas, Texas, of the value of nine thousand dollars $9,000.00, and personal property in the State of Texas consisting of seventeen shares of the capital stock of the American National Bank of Dallas, Texas, and worth about four or five
124 thousand dollars, and other stock in corporations in the State of Texas, the exact value of which is to the plaintiffs unknown. That said Sarah Rawlings died also seized and possessed of the following real estate situated in the Town of Haskell, in the Western District of the Indian Territory, described as follows: Lots seven (7), eight (8), nine (9), ten (10) in *the* block sixty-two (62), in the town of Haskell, Indian Territory, with all improvements thereon, and of the reasonable value of four thousand dollars, ($4,000.00); that said Sarah Rawlings has left personal property in the Western District of the Indian Territory consisting of household and kitchen furniture, piano, silverware, jewelry, diamonds, etc., and one horse and buggy and other personal property of the value of Twenty-five hundred dollars $2,500.00, making her estate of the value of thirty-six thousand five hundred — $36,500.00 or more.

Plaintiffs further represent that since the death of the said Sarah Rawlings the plaintiff, Sidney C. Chapple, has, for a valuable consideration, conveyed an undivided one-half interest in the estate of the said Sarah Rawlings to the plaintiff, J. C. Scully; a copy of said conveyance is hereto attached, marked Exhibit "A."

Plaintiffs further represent that for a year or more preceding her death the said Sarah Rawlings was in an exceedingly bad state of health; that she was physically exceedingly weak, reduced and emaciated, which condition, of course, became more pronounced as she approached the period of her dissolution; that during the time she was suffering from a severe and incurable disease which became more and more pronounced; that her nervous system was practically

wrecked; that her will power during all of this time was so reduced that she became unable to resist the influence or suggestions of any person about her for a short space of time, and seeking to influence her actions; that her mind became impaired and deranged to such an extent as to make her wholly incapable *to* making a valid will; that her judgment and ability to transact business and handle her affairs properly was utterly gone; that she became susceptible to the slightest influence of those about her, and easily pliable in
125 their hands; that in particular she became easily subject to the influence and suggestions of lawyers and doctors whom she employed in a professional way; that she reached a condition that she had not sound and disposing mind and memory, but was so weak and feeble from ill health and her mind and memory so impaired, and she was so easily subject to suggestions and influence of those about her as to render her wholly incapable of making a valid will, or a just and proper distribution of her estate.

That while she was in this condition she became acquainted with the defendant, Samuel E. Gidney, who was a lawyer by pro*f*ession; said defendant perceiving her condition, and realizing her incapacity and her susceptibility to the influence of those a*g*out her, especially of her professional advisers, and knowing that she could not live but a few months, conceived the idea of defrauding the plaintiff Chapple out of his right and interest in his mother's estate, and of depriving him of what would have come to him from such estate as sole heir-at-law of the said Sarah Rawlings, and thereupon proceeded to take advantage of his professional relations and of the con*di*fence it inspired, and of the reduced condition of the said Sarah Rawlings, mentally and physically, to work upon her and influence her by arts and suggestions to disinherit the plaintiff, and to make the defendant the beneficiary in her will.

Defendant, in order to induce the said Sarah Rawlings to execute a will in his favor, took advantage of his confidential position and relation as attorney and legal adviser of the said Sarah Rawlings, and poisoned her mind and alienated her affections from the plaintiff, Sidney C. Chapple, and her other relatives, including a brother and nieces, by false and fraudulent statements as to what he was doing for her, and how little your petitioner, Sidney C. Chapple, and her other relatives cared for her, and how badly said Sidney C. Chapple had acted, and was acting and thus on or about the 23rd day of October, 1905, induced the said Sarah Rawlings to execute a certain instrument in writing, purporting to be her last will and testament, whereby she bequeathed all of her estate, both real
126 and personal, as follows: To Sidney C. Chapple, who is one of the plaintiffs, five hundred dollars, with any debt which he may be owing to the said Sarah Rawlings, at the time of her death; To Samuel E. Gidney, defendant herein, and his heirs and assigns forever, all of the rest, residue and remainder of her estate real, personal and mixed, of whatsoever kind, and wheresoever situated, whereof she may die seized or possessed, or having an interest in at the time of her death, which property consisted of real estate, bank stock, cash on hand and personal property of the value of thirty

thousand dollars $30,000.00 or more, and thereafter, to-wit, on the 13th day of April, 1906, said Sarah Rawlings executed an instrument in writing, purporting to be a codicil of her aforesaid will, and under and by said purported codicil professedly bequeathed to Charity Dobbs the sum of Fifty Dollars $50.00 and to her brother, Sullivan Thorn, of Senoraville, Georgia, all of her dresses, cl-aks, clothing and such wearing apparel. A copy of said pretended will is hereto attached, marked Exhibit "B."

That the defendant Gidney, at the time such will was executed, had obtained such complete control over the mind of said Sarah Rawlings as to render he- incapacitated to know what she — doing at the time she executed the said purported will, and exerted an undue influence upon her, she being at the time so much under his arts and influence as to be incapable of doing any other that that which he advised, and thus, by means of such influence, induced her to execute the will aforesaid at the time she lacked mental capacity to make the will, and when she would not have made this will but for such undue influence of the defendant, Gidney, as aforesaid.

Plaintiffs represent that the plaintfiff, Sidney C. Chapple, has been for about one year absent from home, and away from his mother; that he was youthful, inexperienced in business matters, uninformed as to legal rules, ignorant of the law and its proceedings; that he knew that the defendant, Gidney, had been his mother's adviser and was familiar with the condition of her es-
127 tate; that because of the fact that the defendant, Gidney, had acted as his mother's lawyer *that* plaintiff, Chapple, had confidence in him, and believed his stat-ments and *t*epresentations; that a few days after his mother's death, of which he was advised by telegram from the defendant, Gidney, plaintiff, Chapple, came to the office of said defendant, in Muskogee.

That said defendant, as part of his original purpose to defraud plaintiff, Chapple, and to secure his estate, knowing that the will aforesaid was invalid for the reasons above stated, and knowing as a lawyer that the same could be set aside and avoided, and knowing that it would be necessary to secure from the plaintiff other instruments of conveyance, or release of his rights or acts of estoppel to set up the same, and in pursuance of his original purpose to defraud this p'aintiff, and in continuation of his plea, or scheme, by which such fraud would be made successful, made *b*arious misrepresentations, and was guilty of many acts of concealment when plaintiff came to his office as aforesaid. He represented to plaintiff that Sarah Rawlings, his mother, had made a will wher-in she had disinherited him, the said Sidney C. Chapple, and conveyed, devised and bequeathed all of her property, of every kind and character, to him the said defendant; that the will was a good will in law, and plaintiff could not defeat it, and if he did he would not get as much out of the estate, after paying his lawyer's fee, as five hundred — $500.00.

That he, Gidney, would have every advantage of him in any suit to set aside the will, because, being a lawyer, he could conduct the case without expense; that with reference to the interest that was

still in the hands of the administrator in Texas, it was not certain whether the heirs of H. H. Rawlings, deceased, the husband of Mrs. Rawlings, would not come in and get the same; that if plaintiff should contest the will it would take three or four years to bring the matter to such a stage that the plaintiff, Sidney C. Chapple, could get any money from his mother's estate. The defendant Gidney, further represented that the said Sarah Rawlings left
128 very little property; that she had made some bad investments, and that she owed some very heavy bills, including an indebtedness of five thousand dollars $5,000.00 for money which he, Gidney, had loaned her, and for his services rendered. That after the debts were paid there would be very little left, probable not enough to pay his, Gidney's fees; that there would not be more than seven hundred to one thousand dollars $700.00 to $1,000.00, at the outside, left after the payment of the debts, that the bank stock owned by her was worth seventeen hundred dollars $1,700.00; that the total estate, not counting the debts, would not be worth more than six or seven thousand dollars $6,000.00 to $7,000.00.

That the defendant, Gidney then said that he was willing to divide what Mrs. Rawlings had left with plaintiff, and would give him five hundred dollars $500.00 if plaintiff would convey to him, Gidney, all his right, title and interest. The defendant, Gidney, had already loaned plaintiff ten dollars $10.00. Plaintiff requested, in addition to the five hundred dollars $500.00 the diamond ring and a pair of diamond ear bobs that belonged to his mother in her life time, and that the defendant agreed to let him have them, and subsequently delivered them to him; that plaintiff agreed to this proposition, and on the 22nd day of June, 1906, he executed to the said Samuel E. Gidney, an instrument in writing conveying all of his right, title and interest in his mother's estate to the defendant. Gidney, said deed reciting a consideration of five hundred and ten Dollars $510.00, a large diamond ring and a pair of ear-bobs, which some time thereafter were delivered to the plaintiff. At the same time an instrument was prepared by the defendant, Gidney, and executed by plaintiff, Chapple, in its nature a receipt, release and acquittance by plaintiff, Sidney C. Chapple, as devisee and legatee under the will of said Sarah Rawlings, in favor of the defendant, Gidney, as executor of her will for a purported consideration of five hundred dollars $500.00 paid to plaintiff, but in truth and in
129 fact no consideration whatever was paid for said release. Copies of said conveyance and release are hereto attached, marked Exhibits "C" and "D," respectively.

Plaintiffs further represent that at the time said deed and release were made the plaintiff, Chapple, believed the representations of defendant, Gidney, to be true and relied upon the same; that he was ignorant of the facts of the mental incapacity of said Sarah Rawlings, and the undue influence as hereinbefore alleged; that he was ignorant of his right and ability to set aside said will under the law, and relied upon the legal judgment and opinion of the defendant, Gidney; that because of his absence from his mother's hom- plaintiff was not informed about his mother's property rights, or of her sub-

sequent condition, but knew that defendant, Gidney, had been his mother's legal adviser for some time and was familiar with her estate and financial and personal condition, and believed the statements of said defendant, Gidney, to be true, and relied thereupon, and because of his belief in same he executed the deed and release above mentioned.

Plaintiffs allege that such representations were not true, and were well know- to the said Gidney to be untrue, and were fraudulently made with a view of inducing plaintiff, Chapple, to sign said deed of conveyance and execute said release; that the estate was truly worth thirty thousand dollars $30,000.00 above all indebtedness; that the bank*d* stock referred to was worth between four and five thousand dollars $4,000.00 and $5,000.00; that the said Gidney had not loaned the said Sarah Rawlings five thousand dollars $5,000.00, and that she was not indebted to him in such sum, and not justly indebted to him in any sum; that the interests in the hands of the administrator in Texas were not in doubt, not liable to be obtained by the heirs of H. H. Rawlings; that such interests were certain/ definite and fixed and vested in the estate of Mrs. Sarah Rawlings; that the will aforesaid was not a good will in law, and this defendant, Gidney, well knew, and that plaintiff in law could defeat said will, and if he did, could get out of the estate, after paying his lawyers, very much more than five thousand dollars $5,000.00; that
130 the defendant, Gidney, was perfectly familiar with the estate of said Sarah Rawlings, and knew that the statements and representations he made to the plaintiff, Chapple, were false, and well knew the said estate was worth thirty or forty thousand dollars $30,000.00 or $40,000.00.

Plaintiffs further aver that at the time plaintiff, Sidney C. Chapple, made the alleged conveyance and executed said release the defendant, Gidney, well knew that the plaintiff's mother, Sarah Rawlings, at the time of execution by her of said will, lacked the testamentary capacity and was mentally incapable of making a valid will, and well knew of her weak physical condition and of her inability to resist the suggestions and influence of those about her, and that he had taken advantage of her mental incapacity, her weakened condition and susceptibility to influence, and of the influence which he had over her by reason of his being her attorney and legal adviser, which influence was irresistible, and had unduly influenced *d*aid Sarah Rawlings to make the will aforesaid, and to disinherit the plaintiff, Chapple, and to make defendant the beneficiary in said will; that the facts recited were, because of the youth, inexperience, lack of knowledge and absence from home much of the time preceding his mother's death, not known to the plaintiff, Chapple, though well known to the defendant, Gidney; that the plaintiff, by reason of the facts, supposed that the will was executed was a valid instrument, and that he was without right to his mother's estate; that the defendant, in pursuance of hir original, fixed and continued purposes to defraud the plaintiff, Sidney C. Chapple, by procuring from his mother by unlawful means and in the absence in testamentary capacity on her part a will in defendant's favor, and

to cure the vice in such will by obtaining a conveyance of his interest from the plaintiff, Chapple, and by including on his part further acts that could be pleaded as acts of estoppel, knowingly and fraudulently withheld and concealed from the plaintiff, Sidney C. Chapple,
131 the facts within the knowledge of the defendant, Gidney, as above set out, and induced the plaintiff to make the conveyance and execute the instrument of release under the impression that said will was valid, and that plaintiff, Chapple, was without right in or to his mother's estate, except as herein provided, and thus the plaintiff, Chapple, was overreached and defrauded by the said Gidney by reason of the confidence the plaintiff, Chapple, had in him, and by his fraudulent representations and concealments as above alleged.

Plaintiffs further allege that at the time of the execution of said conveyance, on the 22nd day of June, 1906, the defendant, Gidney, had in his hands money belonging to the estate of the said Sarah Rawlings, largely in excess of the five hundred and ten dollars $510.00, paid to the plaintiff, and that the same was the money of the plaintiff, Sidney C. Chapple, and not the money of the defendant, Gidney, and that the diamond ring and the diamond ear bobs were the property of the plaintiff, Chapple, and not the property of the defendant, Gidney, and for that reason defendant, Gidney, did not pay him anything, but on the contrary, there was a total failure of consideration for said conveyance and said instrument of release, and plaintiffs are not therefore required to return said money, ring and ear bobs. Plaintiffs say that if it should be shown upon the hearing that the five hundred and ten dollars $510.00 received by the plaintiff, Chapple, from the defendant, Gidney, was not belonging to the estate of Sarah Rawlings, but was money of the defendant, Gidney, that plaintiffs, are willing to do equity, and will, upon the establishment of such facts by this court, repay such money with interest to the said Gidney, and are willing to have the relief awarded them by the Court.

Plaintiffs further represent that if it were true that the five hundred dollars received by the plaintiff, Chapple, from defendant, Gidney, was in fact the money of said Gidney, such sum was and is a totally inadequate consideration for the rights, properties and interests conveyed aforesaid; that the inadequacy was and is so gross as to shock the conscience.

Premises considered, plaintiffs pray that said conveyance
132 by said Sidney C. Chapple to said Samuel E. Gidney be cancelled by the decree of this court, set aside and held for naught; that the said instrument of release, except as it purports to be a receipt for money, be canceled by decree of this court, set aside and held for naught; that the said Samuel E. Gidney be required by said decree to reconvey all of said property described in said conveyance to plaintiffs within an early day, to be fixed by the court, and upon his failure to do so that the master in chancery of this court be ordered and directed to execute a good and sufficient conveyance to all of said property to plaintiffs, and upon such conveyance being made by said master in chancery that it shall have

the effect of divesting said Samuel E. Gidney of all title or interest in said property, and of vesting the same in plaintiffs, and that the defendant, the said Samuel E. Gidney, be decreed to pay the costs of this suit, and the plaintiffs further pray for such other and further relief in the premises as to Your Honor shall seem meet and equitable.

LEWIS & PHILLIPS,
W. F. SCHUERMEYER,
RAYMOND, MAXEY & RUNYAN,
Attorneys for Complainants."

J. C. Scully, being first duly sworn upon oath, states that he is one of the plaintiffs in the above styled cause, and that he has read the above and foregoing amended complaint, and that the matters and things contained therein are true.

J. C. SCULLY.

Subscribed and sworn to before me this 7th day of February, 1907.
CHARLES L. TOOR,
Notary Public.
My Commission Expires November 18th, 1908.

Plaintiffs' "Exhibit "C."

133 Omitting Caption.

Answer to Amended Complaint.

I.

Defendant, in answer to the amended complaint filed herein, admits that all said parties are residents of the Western Judicial District of Indian Territory, but denies that the subject matter of this suit is situated in the Western District of the Indian Territory.

Defendants admits that if Sarah Rawlings, deceased, died intestate, the plaintiff, Sidney C. Chapple, was and is her sole heir-at-law, and denies that Edward Chappell was the father of Sidney C. Chapple, and admits that Sarah Rawlings was his mother, and that she departed this life on or about the 16th day of June, 1905, at Haskell, in the Western District, and denies that she died intestate.

Defendant further denies that at the time of the death of the said Sarah Rawlings she was seized and possessed of a large amount of real estate and personal property consisting of farm lands in Ellis County, Texas, of the value of ten thousand dollars; also farm lands in Scurry County, Texas; Fisher County, Texas; Nolan County, Texas, and Reeves County, Texas, of the value of at least of $15,000.00, and personal property in the State of Texas consisting of seventeen shares of the capital stock of the American Exchange National Bank of Dallas, and worth about four or five thousand dollars, and other stock in other corporations in the State of Texas.

Defendant admits that Sarah Rawlings died seized and possessed of real estate in the town of Haskell, in the Western District of the Indian Territory, described as follows; Lots seven, eight, nine and ten, in block sixty-two, in the town of Haskell, Indian Territory, with improvements thereon, but defendant denies that the reasonable value of the same is four thousand dollars.

Defendant admits that Sarah Rawlings has left personal property in the Western District of the Indian Territory, consisting of household and kitchem furniture, piano, silverware, etc., and one horse and buggy, and other personal property, but denies that the
134 value of the same is two thousand five hundred dollars; and defendant further denies that the value of her estate is thirty-six thousand five hundred dollars, or more.

As to whether the plaintiff, Sidney C. Chapple, has conveyed an undivided one-half interest in the estate of the said Sarah Rawlings to the plaintiff, J. C. Scully, or that he is now the joint owner of the same with the said Sidney C. Chapple, this defendant has not sufficient information on which to found a belief and therefore denies the same, but alleges that if any such purported sale was made the consideration therefor is illegal and void and of no value and effect, for the reason that it is champertous and against the polich of the law, the consideration therefor, being to employ counsel, the payment of costs by the said J. C. Scully, the receipt of the same by the said Sidney C. Chapple for the purpose and intention on the part of said parties to promote litigation, stir up strife and is speculative in its nature, all of which is shown by Exhibit "A"; attached to plaintiff's amended complaint, and for this reason this suit should abate.

Defendant further admits that for a year or more precedin- the death of the said Sarah Rawlings she was in a bad state of health, and was physically weak, and that this condition became more pronounced as she approached death; that she was suffering from an incurable disease, which became more pronounced, but denies that said disease affected her nervous system or her will power, or that she became unable to resist the influence or suggestions of aby person about her seeking to influence her actions, or that her mind became impaired or deranged to such an extent as to make her wholly incapable of making a valid will, or that her judgment and ability to attend to business and to handle her affairs properly was utterly gone, or that she became susceptible to the slightest influence of those about her, and easily pliable in their hands, or that she became easily susceptible to the influence of lawyers and doctors whom she had employed, or that she reached a condition that she had no sound and disposing mind and memory, or that she was so weak and feeble from ill health and her mind and memory
135 so impaired and was so easily subject to the suggestions and influences of those about her as to render her wholly incapable of making a valid will, or a just and proper distribution of her estate.

The defendant admits that he is a lawyer by profession, but denies that he conceived the idea of defrauding the plaintiff,

Chapple, out of his right and interest in hi- mother's estate, or of depriving him of what would have come to him from such estate as the sole heir-at-law of Sarah Rawlings, or proceeded to take advantage of his professional relations, or of the confidence it inspired, or of the reduced condition of the said Sarah Rawlings mentally or physically for the purpose of working upon her, or to influence her by arts and suggestions, or to disinherit the plaintiff, and to make the said defendant the beneficiary in her will.

He denies that he took advantage of any confidential position or relation as attorney or legal adviser of the said Sarah Rawlings to induce her to execute her will in his favor, or poison her mind, or alienate her affections from her son or her other relatives by false and fraudulent statements as to what he was doing for her, or how little her son and other relatives cared for her, or how badly her son had and was acting, or that he thereby induced the said Sarah Rawlings to execute an instrument in writing on October, 23d, 1905, purporting to be her last will and testament, whereby she bequeathed all of her estate, both real and personal, as therein set out, and denies that said property was of the value of thirty thousand dollars or more, and admits that on the 13th day of April, the said testatrix executed a codicil to her aforesaid will, a true copy of which, as well as said will, is practically set out as Exhibit "B" in plaintiff's amended complaint; he denies that he exercised any undue influence or used any undue means whatsoever in the procurement of said will, or of said codicil.

Defendant denies that he had obtained such complete control over the mind of the said Sarah Rawlings at the time of the execution of said will as to render he- incapacitated to know what she was doing at the time she executed the said will, or that she was so much under his arts and influence as to be incapable of doing
136 any other than just what he advised, or by undue means induced her to execute the will aforesaid at the time she lacked the mental capacity to make the will, or when she would not have made the will but for such undue influence.

Defendant denies that plaintiff, Sidney C. Chapple, had been absent from about one year from home, or away from his mother, or that he was youthful and inexperienced in business matters, uninformed as to legal rules, or ignorant of the law or its procedure.

Defendant denies that by reason of the fact that the defendant was acting as his mother's lawyer he had great confidence in him and believed his statements and representations, and admits that a few days after his mother's death he came to the office of said defendant in Muskogee, after having been advised of his mother's death by defendant, but denies that plaintiff knew that defendant was familiar with the condition of his mother's estate.

Defendant denies that as a part of his original purpose and to secure said estate, or in pursuance of his original purpose to defraud plaintiff and in continuation of his plan or scheme by which such fraud would be made successful, mad- various misrepresentations and was guilty of many acts of concealment when plaintiff came to his office, or represented to plaintiff that his mother had

made a will disinheriting him and devising all of her property to this defendant, or that the will could not be defeat*h*ed by the plaintiff, or if he did defeat the will he would not get as much out of the estate after paying his lawyer's fees a*d* five hundred dollars.

Defendant denies that he stated to the plaintiff, Chapple, that he would have every advantage of him in any suit to set aside the will because, being a lawyer, he could conduct the case without expense, that it was not certain whether the heirs, of H. H. Rawlings would not come in and get the estate in Texas, or that if plaintiff would contest the will it would take three or four years to bring the matter to such a stage that plaintiff could get any money
137 from *this* mother's estate, or that defendant represented that Sarah Rawlings left very little property, or that she had made some bad investments, or that she owed some very heavy bills, including an indebtedness of five thousand dollars to himself for money loaned her and for his services rendered, or that after the debts were paid there would be very little left, probably not enough to pay defendant's fees, or that there would not be more than seven hundred or one thousand dollars at the outside left after the payment of the debts, or that the bank stock was worth seventeen hundred dollars or that the total estate, not counting the debts, would not be worth more than six or seven thousand dollars.

Defendant denies that he stated to plaintiff, Chapple, that he was willing to divide what Mrs. Sarah Rawlings had left with him and would give him five hundred dollars if plaintiff would convey all his right, title and interest to him. He denies that plaintiff requested in addition to the five hundred dollars the diamond ring and diamond ear-bobs that belonged to his mother, but states the fact to be that said proposition was made by the defendant, and agreed upon between them, and admits that said property was delivered to plaintiff, and admits that plaintiff executed to defendant an instrument in writing conveying all of his right, title and interest in his mother's estate to the defendant, reciting a consideration of five hundred and ten dollars, a large diamond ring and a pair of diamond ear bobs; and at the same time an instrument was executed by plaintiff in its nature a receipt, release and acquittance as devisee and legatee under the will of the said Sarah Rawlings in favor of the defendant as executor of her will for a purported consideration of five hundred dollars paid to plaintiff, but denies that no consideration was paid therefor, and that said release and acquit-ance was executed to the defendant in his individual capacity as well as executor.

He denies that at the time said deed and release were made that plaintiff believed the *p*epresentation to be true, or relied upon the same, or that he was ignorant of the facts of the mental incapacity of the said Sarah Rawlings, and admits that he was ignorant
138 of undue influence or the mental incapacity of his mother, or of his ability to set aside her will, and states the fact to be that there was no undue influence of which he could have knowledge, or that his mother was mentally incapable of making her

said will, and denies that he relied upon the legal judgment and opinion of the defendant, Gidney, or was ignorant of his right to set aside his will of he had any grounds therefor; denies that he was not informed about his mother's property rights, or of her subsequent condition or that he believed the statements, of said defendant and relied upon them, and because of his belief in the same executed the said deed and release.

Defendant denies that he knew that he was familiar with his mother's estate and financial and personal condition, and denies that he made such representation, or that they were fraudulently made with a view of inducing plaintiff to sign said deed and execute said release. He denies that said estate was worth thirty thousand dollars above all indebtedness, or that the bank stock was worth four or five thousand dollars. He admits that he had not loaned the said Sarah Rawlings five thousand dollars, but denies that she was not indebted to him in any sum, and denies that the defendant had been paid a sum more than sufficient to compensate him for the services rendered for the testatrix, and denies that said will was not a good will in law, or that the defendant knew that fact, and that plaintiff could in law defeat said will, and if he did, could get out of the estate, after paying his lawyers, very much more than five thousand dollars. Defendant denies that he was perfectly familiar with the estate of said Sarah Rawlings, or knew the statements and representations that he made to the plaintiff were false, or knew that said estate was worth thirty or forty thousand dollars.

He denies that he knew at the time of the making of said conveyance and release that Sarah Rawlings, at the time of the execution of her will, lacked testamentary capacity, and was mentally incapable of making a valid will, and of her inability to resist the suggestions and influence of those about her, and that he
139 had taken advantage of her mental incapacity, of her weakened condition and susceptibility to influence and of the influence he had over her by reason of being her attorney and legal adviser, and denies that such influence was irresistible or knew that he had unduly influence- her to make the will and to disinherit the plaintiff, and to make defendant the beneficiary in said will, and denies that the true condition of the testratrix and of her affairs and of defendant's relation to her was unknown to the plaintiff.

Defendant states that the plaintiff, Chapple, is not a youth, but a full grown man, twenty-seven years of age, and had been in business for a number of years prior to the execution of said release and deed, and had a large business experience, familiarizing himself with business transactions, and was more familiar with his mother's affairs than was the defendant.

Defendant denies that he pursued any original, fixed and continued purpose to defraud the plaintiff in any manner, or knowingly or fraudulently withheld or concealed from the plaintiff any facts within his knowledge concerning said estate or the true condition of his mother prior to her death, or any fact in relation to

the procurement of said will or induced the plaintiff to execute the release and conveyance under the impression that he was without right in and to his mother's estate, except as provided in said will, and denies that he was over reached and defrauded by defendant by reason of the confidence he reposed in him, or by his fraudulent representations and concealments, or that he procured said release and conveyance to cure any vice in said will.

The defendant denies that at the time of the execution of said conveyance he had money in his hands belonging to the estate largely and in excess of five hundred and ten dollars, and that the money paid to the plaintiff, Chapple, was his money, and not the money of the defendant, Gidney, and denies that the diamond ring and the ear bobs were the property of the plaintiff, and not the property of the defendant, Gidney, or that there was a total failure of consideration on said conveyance and release.

140 Defendant states that the money paid by him to the plaintiff in consideration of said release and conveyance was the property of the defendant, and not the property of said estate of *of* the plaintiff, and that the same has never been returned to him or tendered to him by the plaintiff, Chapple, or any one in his behalf, prior to the bringing of this suit, or at any time.

Defendant denies that the consideration for said release and conveyance is totally inadequate or that it is so gross as to shock the conscience.

II.

For further answer, defendant alleges that said release and acquittance and the conveyance were made and executed in full settlement and compromise of all the rights and interests of said plaintiff, Chapple, as heir and legatee and defisee to his mother's estate, and was made with full knowledge after due consideration of all the facts in relation to his status under the will and surrounding the execution of the same, and all facts in relation to his mother's estate known to the defendant, and upon due deliberation and without any misrepresentation or fraud practiced upon him by the defendant, and for a valuable consideration and to avoid any litigation then threatened by the said plaintiff in relation to said will, or said estate.

III.

For further answer defendant alleges that prior to the commencement of this suit there was then pending and still is pending, in this court a suit involving the subject matter of said will and its execution and the validity thereof, being the same subject matter involved in this action so far as said will is concerned, between the same parties thereto, and which suit is undisposed of, and is pending *this* this court, a court having complete and full jurisdiction of the parties thereto, and the subject matter of said suit, and the matters pleaded in plaintiff's bill in this suit in relation to the execution of the will described therein, and all the acts and doings in relation thereto charged against this defendant as well as the undue

influence and fraud charged are involved in the other suit,
141 and the plaintiffs are thereby barred from prosecuting this suit in relation to said will as involvin- the same issues involved in the former suit.

IV.

For further answer defendant states that plaintiffs are estopped from setting aside said deed of conveyance and release for the reason that they have not returned or offered to return the money paid to said plaintiff, Sidney C. Chapple, as, a consideration in said settlement, but have retained the same and ratified the settlement so made, and have performed no act prior to the bringing of this suit to rescind said contract or disaffirm the same, and neither of said plaintiffs have demanded, prior to the bringing of this suit, a rescission of said contract or offered to restore the consideration money paid by the defendant for securing said conveyance and release and acquittance.

Wherefore, premises considered, defendant prays that the said cause may be dismissed as to him; that he may have and recover his costs, and for all other proper relief in the premises.

HUTCHINGS, MURPHY & GERMAN,
Attorneys for Defendant.

UNITED STATES OF AMERICA,
Indian Territory, Western District, ss:

Samuel E. Gidney, being first duly sworn, upon oath states that he is the defendant in the above entitled cause and that he has read the foregoing answer to amended complaint, and that the matters and things contained therein are true.

SAMUEL E. GIDNEY.

Subscribed and sworn to before me this 15th day of March, 1907.

MINNIE P. DUMAS,
Notary Public.

My commission expires Jan. 17, 1911."

Plaintiffs' Exhibit "D."

142 Omitting Caption.

Decree.

Now, on this 27th day of June, 1908, this cause coming on for final hearing upon the amended complaint of the plaintiffs, and answer of the defendant, and report of the master in chancery, and all the evidence and the exceptions thereto, and the Court having heard the pleadings read and report of the master in chancery, and read the evidence taken before said master and the exceptions to said report, and the argument of counsel, and being well and sufficiently advised in the premises, doth find that the exceptions

to the master's report are well taken, and the same are sustained, and the court makes the following findings and decree.

(I.)

The court finds that the conveyance and the release executed by the plaintiff, Sidney C. Chapple, to the defendant, Samuel E. Gidney, on the 22nd day of June, 1904, were obtained by the said Gidney by fraudulent representation, and by a failure to disclose knowledge in his possession in relation to the estate of Sarah Rawlings, which was his duty to disclose.

(II.)

The court further finds that the defendant, Samuel E. Gidney, had at the time of the execution of said instruments been the attorney for Sarah Rawlings, the mother of the plaintiff, Sidney C. Chapple, for something like one year; that he had been her attorney and confidential adviser, and had been paid to look after her estate and had taken trips to Texas for the purpose of ascertaining the status of her estate, and that he had thus obtained knowledge of her said estate and affairs which was unknown to Sidney C. Chapple at the time of the execution of said instruments, and that the defendant Samuel E. Gidney, failed to disclose what he knew in relation to said estate, to the said Sidney C. Chapple, but withheld information which it was his duty to disclose.

(III.)

The court further finds that the plaintiff, Sidney C. Chapple, had spent but little time at the home of his mother for the last years of her life and knew but little of the estate, and that he relied
143 upon Gidney, who had been the attorney for his mother, and was the executor of what purported to be her Will, and that he believed what Gidney told him, and acted upon Gidney's representations.

(IV.)

The court finds that taking into consideration the value of said estate, which is worth from $10,000.00 to $15,000.00 that the consideration of $510.00 was totally inadequate when considered in connection with the facts and circumstances under which said instruments were procured.

(V.)

The court further finds that the will executed by Sarah Rawlings on the 23rd day of October, 1903, in which she virtually disinherited her son, Sidney C. Chapple, and left her estate to the defendant, Samuel E. Gidney, is void for the reason that the said Sarah Rawlings did not have sufficient testamentary capacity at the time of executing the same to make a fair and intelligent disposition of her estate.

(VI.)

The court further finds that the defendant, Gidney, is entitled to a return of the consideration paid by him to the said Sidney C. Chapple for the execution of said instruments, and that the said Sidney C. Chapple shall return the same to him upon the execution by the said Gidney of a good and sufficient conveyance reconveying to him all of the property included in said instrument.

(VII.)

The court further finds that the plaintiff, J. C. Scully, is the owner of an undivided one-half interest in the estate of the said Sarah Rawlings, deceased, by virtue of a conveyance executed to him by his co-plaintiff, Sidney C. Chapple, on the 3rd day of August, 1906.

(VIII.)

It is therefore considered, ordered, adjudged and decreed by the court that the conveyance and release from Sidney C. Chapple to the defendant, Samuel E. Gidney, made on the 22nd day of June, 1906, be and the same are hereby cancelled and set aside and held for naught.

It is further considered, ordered, adjudged and decreed by the court that the plaintiff, Sidney C. Chapple, and J. C. Scully return to the defendant, Samuel E. Gidney, the sum of $5,000.00 together with interest thereon from the 22nd day of June, 1906, at the rate of 6 per cent per annum, being the consideration paid by the said Gidney for the conveyance and release herein cancelled and set aside, and that the said Samuel E. Gidney surrender up the said conveyance and release, and that he execute to the plaintiffs, Sidney C. Chapple and J. C. Scully, a reconveyance of all the property so conveyed to him.

It is further ordered, considered, adjudged and decreed by the court that the plaintiffs, Sidney C. Chapple and J. C. Scully, deposit the diamond ring and cuff-links belonging to the estate of Sarah Rawlings with the clerk of this court to be held by him subject to the future order of this court.

It is further considered, ordered, adjudged and decreed by this court that the defendant, Samuel E. Gidney, pay all the costs of this proceeding, and that any part of the costs that have heretofore been paid by plaintiffs shall be deducted out of the said $5,000.00 which they are herein required to return to the said Samuel E. Gidney.

It is further ordered, considered, adjudged and decreed by the court that the clerk in taxing the costs in this cause shall include the fee of the master in chancery for his services, and the amount paid the said master for stenographer fees, and the witness fees of the witnesses who were before said master, and the fees for taking depositions of witnesses, and for all other costs in the proceedings.

And that execution issue for the collection of same.

To all of which findings and decree defendant excepts and prays an appeal to the Supreme Court, which plea is by the Court granted.

and the defendant is allowed sixty days to make and serve case made, and plaintiff is allowed ten days to suggest amendments and same to be settled upon five days' notice.

R. McMILLAN, Judge.

Plaintiff's Exhibit "E."

143 In the Superior Court of Muskogee County, Oklahoma, the Successor to the United States Court for the Western District of the Indian Territory, at Muskogee.

No. 1124.

HENRY C. CHAPPELL and J. C. SCALES, Plaintiffs,
vs.
SAMUEL E. GIBNEY, CHARLES DUNN and MARSHALL DUNN, Defendants.

testamentary capacity at the time of executing the same to make a fair and intelligent disposition of her estate.

And it was therefore decreed in said judgment and decree that the issue therein be in favor of the plaintiffs, that said judgment and decree was appealed from in proper form by the said defendant, Samuel K. Sidney, therein to the Supreme Court of the State of Oklahoma, that thereafter on the 14th day of July, 1914, the said Supreme Court of the State of Oklahoma affirmed the said judgment and decree, and that a mandate issued thereon to the said District Court of Muskogee County, Oklahoma, and the cause was thereafter spread of record in the said District Court of Muskogee County, Oklahoma, that by the said judgment and decree it was adjudicated that the said Sarah Eva Sidney did not have sufficient capacity on October 27, 1910, at the time the said paper writing was executed and that the same was void and should be cancelled, that it is therefore the duty of the defendants to deliver up the said paper writing to be cancelled, that the plaintiffs have been damaged in the sum of $5,000.00 by the refusal of the defendants to deliver up the said paper writing to be cancelled, and

Fifth. Because the cause of action set up in said portion of said complaint was not between the same parties as the cause of action set up in this suit, that Charity Dobbs and Sullivan Thorn, necessary parties to this suit, were not parties to suit No. 7040, the proceedings and judgment in which are set up in this cause of action and made a part of the complaint herein sought to be stricken out.

Sixth. Because the court in which said action No. 7040, which is plead in this action, had no jurisdiction to grant the relief prayed in this action and had no jurisdiction to set aside and cancel the will which is sought to be set aside and cancelled in this action.

GEOR. A. MURPHY,
HUTCHINGS & GERMAN,
Attorneys for Samuel E. Gidney.

148 In the Superior Court of Muskogee County, Oklahoma.

No. 1173.

SIDNEY C. CHAPPLE et al., Plaintiffs,
vs.
SAMUEL E. GIDNEY et al., Defendants.

Demurrer.

Comes now the defendant, Samuel E. Gidney, and files this, his demurrer to the second amended petition of the plaintiffs, and for grounds therefor, states:

First. That said second amended petition does not state facts sufficient to constitute an equitable cause of action.

Second. That the United States Court for the Western District of the Indian Territory, in which this suit was originally instituted, could only try the issues involved in this case on its probate side, and did not have jurisdiction to try, and could not try, the issues involved in this complaint on the equity side of its docket, nor has this court to which it has been transferred.

GEORGE A. MURPHY,
HUTCHINGS & GERMAN,
Attorneys for Defendant.

149 In the Superior Court in and for Muskogee County, Oklahoma.

On This Saturday, April 8th, 1911, the Superior Court of Muskogee County, Oklahoma, Met Pursuant to Adjournment. There Were Present Farrar L. McCain, Judge of said Court, Presiding; Robert Toomer, Clerk, and W. E. Disney, County Attorney. And the Following Proceedings Were Had, to wit:

No. 1173. Law.

SYDNEY C. CHAPPLE, Plaintiff,
vs.
S. E. GIDNEY, Defendant.

Now on this the 8th day of April, 1911, the demurrer heretofore submitted to the Court came on for further hearing, and the Court, after having heard said demurrer and being fully advised in the premises, sustains the same, and allowed the plaintiff fifteen (15) days in which to file his amended petition, to which ruling of the Court, the plaintiff at the time excepted.

150 In the Superior Court of Muskogee County, Oklahoma.

Be it remembered, That on this, the 21st day of April, A. D. 1911, the same being one of the regular days of the regular March 1911 Term of said Court, said Court having been opened in due form of law, present the Honorable Farrar L. McCain presiding, Judge of said Court; Robert Toomer, Clerk; John L. Wisener, Sheriff; and W. E. Disney, County Attorney, the following proceedings among others were had to wit:

No. 1173.

SYDNEY C. CHAPPLE and J. C. SCULLY, Plaintiffs,
vs.
SAMUEL E. GIDNEY et al., Defendants.

And now come the plaintiffs, by their attorneys, and file herein in this cause their third amended complaint which is in words and figures as follows, to wit:

151 In the Superior Court of Muskogee County, Oklahoma, Successor to the United States Court for the Western District of the Indian Territory, at Muskogee.

No. 1173.

SYDNEY C. CHAPPLE and J. C. SCULLY, Plaintiffs,
vs.
SAMUEL E. GIDNEY, CHARITY DOBBS and SULLIVAN THORN, Defendants.

Third Amended Complaint.

Comes now your petitioners, Sidney C. Chapple and J. C. Scully, and after leave of Court being first duly had and obtained, file this their third amended complaint, so that the same shall read as follows:

Your petitioners, Sydney C. Chapple and J. C. Scully, respectfully represents that they are citizens of the United States and now residents of Muskogee County, Oklahoma, formerly under the laws of the United States a part of the Western District of the Indian Territory, and that the Defendants, Samuel E. Gidney, and Charity Dobbs are citizens of the United States and residents of the County of Muskogee, Oklahoma, formerly under the laws of the United States a part of the Western District of the Indian Territory, and that the Defendant, Sullivan Thorn, resides at Senoraville, Georgia, and that the nearest place of holding Court in the said Western District of the Indian Territory to the residences of the defendants, Samuel E. Gidney and Charity Dobbs, on the 18th day of August, 1906, was at Muskogee, and that this suit, and the subject matter thereof, was pending in the United States Court of the West-
152 ern District of the Indian Territory at Muskogee at the time of the admission of Oklahoma into the Union as a State.

Plaintiffs further represent that the plaintiff, Sydney C. Chapple, was and is the sole heir at law of Sarah Rawlings, deceased, formerly Sarah Craig, and that prior to her marriage with H. H. Rawlings the said Sarah Rawlings was the wife of Edward Chapple, now deceased, who was the father of the Plaintiff, Sydney C. Chapple, as the said Sarah Rawlings was his mother, and that said Sarah Rawlings departed this life on or about the 16th day of June, 1906, at Haskell, in the Western District of the Indian Territory, of which she was a resident; that she died intestate, leaving as her sole heir at law the plaintiff Sydney C. Chapple.

Plaintiffs further represent that at the time of the death of the said Sarah Rawlings she was seized and possessed of a large amount of real estate and personal property, consisting of farm lands in Ellis County, Texas, of the value of Ten Thousand ($10,000.00) Dollars; also farm land in Scurry County, Texas; Fisher County, Texas; Nolan County, Texas, and Reeves County, Texas, of the value of at least Fifteen Thousand ($15,000.00) Dollars; also town lots in the towns of Pecos and Dallas, Texas, of the value of Nine Thousand ($9,000) Dollars, and personal property in the State of Texas consisting of seventeen shares of the capital stock of the American Exchange National Bank of Dallas, Texas, and worth about Four or Five Thousand Dollars, and other stock in corporations in the State of Texas, the exact value of which is to the Plaintiffs unknown. That said Sarah Rawlings also died seized and possessed of the following real estate situated in the Town of Haskell, in the Western District of the Indian Territory, described as follows:

153 Lots Seven (7), Eight (8), Nine (9), Ten (10), in Block Sixty-two (62), in the Town of Haskell, Indian Territory.

with all improvements thereon, and of the reasonable value of Four Thousand ($4,000.00) Dollars; that said Sarah Rawlings has left personal property in the Western District of the Indian Territory consisting of household and kitchen furniture, piano, silverware, jewelry, diamonds, etc., and one horse and buggy and other personal property of the value of Twenty-five Hundred ($2,500.00) Dollars,

making her estate of the value of Thirty-six Thousand Five Hundred ($36,500.00) Dollars or more.

Your petitioners further represent that the said Samuel E. Gidney, through his arts and fraudulent practices, as hereinafter more fully shown, procured the said Sarah Rawlings to execute an instrument of writing in his favor, purporting to be her last will, and procured the same to be admitted to probate, as hereinafter more fully shown, and thus so incumbered the estate of said Sarah Rawlings, which of right belongs to your petitioner, Sydney C. Chapple, that he, the said Sydney C. Chapple, was unable to obtain control or possession of any part of said estate and being poor and almost destitute of means, to prosecute an action to set aside said Will and other fraudulent conveyances procured by said Samuel E. Gidney, and so was compelled to procure money from some other source, in order to enable him to prosecute the necessary suits to set aside Will and other fraudulent conveyances procured by the said Samuel E. Gidney, for which reason on the 3rd day of August, 1906, he entered in to a contract with his co-plaintiff, J. C. Scully, whereby the said J. C. Scully agreed to employ counsel and advance the necessary moneys for prosecuting said suits in the proper Court to set aside said Will and others
154 conveyances, and in consideration thereof, said J. C. Scully was to receive one-half of whatever property might be recovered in said suit; a copy of said contract is hereto attached, marked Exhibit "A".

Plaintiffs further represent that for a year or more preceding her death the said Sarah Rawlings was in an exceedingly bad state of health; that she was physically exceedingly weak, reduced and emaciated, which condition, of course, became more pronounced as she approached the perior of her dissolution; that during the time she was suffering from a severe and incurable disease, which became more and more pronounced; that her nervous system was practically wrecked; that her will power during all of this time was so reduced that she became unable to resist the influence or suggestions of any person about her for a short space of time, and seeking to influence her actions; that her mind became impaired and deranged to such an extent as to make her wholly incapable of making a valid Will; that her judgment and ability to transact business and handle her affairs properly was utterly gone; that she became susceptible to the slightest influence of those about her, and easily pliable in their hands; that in particular she became easily subject to the influence and suggestions of lawyers and doctors whom she employed in a professional way; that she reached a condition that she had not sound and disposing mind and memory, but was so weak and feeble from ill health and her mind and memory so impaired, and she was so easily subject to suggestions and influence of those about her as to render her wholly incapable of making a valid Will, or a just and proper distribution of her estate.

That while she was in this condition she became acquainted with the Defendant, Samuel E. Gidney, who was a lawyer by pro-
155 fession; that said Defendant, perceiving her condition, and realizing her incapacity and her susceptibility to the influence

of those about her, especially of her professional advisers, and knowing that she could not live but a few months, conceived the idea of defrauding the Plaintiff, Chapple, out of his right and interest in his mother's estate, and of depriving him of what would have come to him from such estate as sole heir at law of the said Sarah Rawlings, and thereupon proceeded to take advantage of his professional relations and of the confidences it inspired, and of the reduced condition of the said Sarah Rawlings, mentally and physically, to work upon her and influence her by arts and suggestions to disinherit the Plaintiff, and to make the Defendant the beneficiary in her Will.

Defendant, in order to induce the said Sarah Rawlings to execute a Will in his favor, took advantage of his confidential position and relation as attorney and legal adviser of the said Sarah Rawlings, and poisoned her mind and alienated her affections from the Plaintiff, Sydney C. Chapple, and her other relatives, including a brother and nieces, by false and fraudulent statements as to what he was doing for her, and how little your petitioner, Sydney C. Chapple, and her other relatives cared for her, and how badly said Sydney C. Chapple had acted, and was acting and thus on or about the 23rd day of October, 1905, induced the said Sarah Rawlings to execute a certain instrument in writing, purporting to be her last Will and Testament, whereby she bequeathed all of her estate, both real and personal, as follows: To Sydney C. Chapple, who is one of the Plaintiffs, Five Hundred ($500.00) Dollars, with any debt which he may be owing to the said Sarah Rawlings, at the time of her death; to Samuel E. Gidney, Defendant herein, and his heirs and assigns forever, all of the rest, residue and remainder of her estate,
156 real, personal and mixed, of whatsoever kind, and wheresoever situated, whereof she may die seized or possessed, or having an interest in at the time of her death, which property consisted of real estate, bank stock, cash on hand and personal property of the value of Thirty Thousand ($30,000.00) Dollars or more, and thereafter, to wit, on the 13th day of April, 1906, said Sarah Rawlings executed an instrument in writing, purporting to be a codicile of her aforesaid will, and under and by said purported codicil professedly bequeathed to Charity Dobbs the sum of Fifty ($50.00) Dollars, and to her brother, Sullivan Thorn, of Senoraville, Georgia, all of her dresses, Cloaks, clothing and such wearing apparel. A copy of said pretended will and codicil is hereto attached, marked "Exhibit B".

That the Defendant, Gidney, at the time such will was executed, had obtained such complete control over the mind of said Sarah Rawlings as to render her incapacitated to know what she was doing at the time she executed the said purported will, and exerted an undue influence upon her, she being at the time so much under his arts and influence as to be incapable of doing any other than that which he advised, and thus, by means of such influence, induced her to execute the will aforesaid at a time when she lacked mental capacity to make the will, and when she would not have made this will but for such undue influence of the Defendant, Gidney, as aforesaid.

Plaintiffs represent that the Plaintiff, Sydney C. Chapple, had been at the time of his mother's death, for about one year, absent from home, and away from his mother, not having spent but a short period of time with her prior to this; that he was youthful, inexperienced in business matters, uninformed as to legal rights, ignorant of the law and its procedure; that he knew that the Defendant,
157 Gidney, had been his mother's adviser and was familiar with the condition of her estate; that because of the fact that the Defendant, Gidney, had acted as his mother's lawyer, *that* Plaintiff, Chapple, had confidence in him, and believed his statements and representations; that a few days after his mother's death, of which he was advised by telegram from the Defendant, Gidney, Plaintiff Chapple, came to the office of said Defendant in Muskogee.

That said Defendant, as part of his original purpose to defraud Plaintiff, Chapple, and to secure his estate, knowing that the will aforesaid was invalid for the reasons above stated, and knowing, as a lawyer, that the same could be set aside and avoided, and knowing that it would be necessary to secure from the Plaintiff other instruments of conveyance, or release of his rights or acts of estoppel to set up the same, and in pursuance of his original purpose to defraud this Plaintiff, and in continuation of his plan, or scheme, by which such fraud would be made successful, made various misrepresentations, and was guilty of many acts of concealment when Plaintiff came to his office as aforesaid. He represented to Plaintiff that Sarah Rawlings, his mother, had made a Will wherein she had disinherited him, the said Sydney C. Chapple, and conveyed, devised and bequeathed all of her property, of every kind and character, to him, the said Defendant; that the Will was good Will in law, and Plaintiff could not defeat it, and if he did he would not get as much out of the estate, after paying his lawyers' fee, as Five Hundred ($500.00) Dollars.

That he, Gidney, would have every advantage of him in any suit to set aside the will, because, being a lawyer, he could conduct the case without expense; that with reference to the interest that was still in the hands of the administrator in Texas it was not
158 certain whether the heirs of H. H. Rawlings, deceased, the husband of Mrs. Rawlings, would not come in and get the same; that if Plaintiff should contest the will it would take three or four years to bring the matter to such a stage that the Plaintiff, Sydney C. Chapple, could get any money from his mother's estate. The Defendant, Gidney, fur*h*ter represented that the said Sarah Rawlings left very little property; that she had made some bad investments, and that she owed some very heavy bills, including an indebtedness of Five Thousand ($5,000.00) Dollars for money which he, Gidney, had loaned her, and for his services rendered. That after the debts were paid there would be very litt'e left, probably not enough to pay his, Gidney's fees; that there would not be more than Seven Hundred to One Thousand ($700.00 to $1,000.00) Dollars at the outside, left after the payment of the debts; that the bank stock owned by her was worth Seventeen Hundred ($1,700.00) Dollars; that the total estate, not counting the debts, would not be

worth more than Six or Seven Thousand ($6,000.00 or $7,000.00) Dollars; that the Defendant, Gidney, then said that he was willing to divide what Mrs. Rawlings had left *with* Plaintiff would convey to him, Gidney, all his rights, title and interest. The Defendant, Gidney, had already loaned Plaintiff Ten ($10.00) Dollars. Plaintiff requested, in addition to the Five Hundred ($500.00) Dollars, the diamond ring and a pair of diamond ear-bobs that belonged to his mother in her life time, and the Defendant agreed to let him have them, and subsequently delivered them to him; that Plaintiff agreed to this proposition, and on the 22nd day of June, 1906, he executed to the said Samuel E. Gidney an instrument in writing conveying all of his right, title and interest in his mother's estate to the Defendant, Gidney, said deed reciting a consideration of Five
159 Hundred and Ten ($510.00) Dollars, a large diamond ring and a pair of ear-bobs, which some time thereafter were delivered to the Plaintiff. At the same time an instrument was prepared by the Defendant, Gidney, and executed by Plaintiff, Chapple, in its nature a receipt, release and acquittance by Plaintiff, Sydney C. Chapple, as devisee and legatee under the will of said Sarah Rawlings, in favor of the Defendant, Gidney, as executor of her will for a purported consideration of Five Hundred ($500.00) Dollars paid to Plaintiff, but in truth and in fact no consideration whatsoever was paid for said release.

Plaintiffs further represent that at the time said deed and release were made the Plaintiff, Chapple, believed the representations of Defendant, Gidney to be true and relied upon the same; that he was ignorant of the facts of the mental incapacity of said Sarah Rawlings, and the undue influence as hereinbefore alleged; that he was ignorant of his right and ability to set aside will under the law, and relied upon the legal judgment and opinion of the Defendant, Gidney; that because of his absence from his mother's home, Plaintiff was not informed about his mother's property rights, or of her subsequent condition, but knew that defendant, Gidney, had been his mother's legal adviser for some time and was familiar with her estate and financial and personal condition, and believed the statements of said Defendant, Gidney, to be true, and relied thereupon, and because of his belief in same he executed the deed and release above mentioned.

Plaintiffs allege that such representations were not true, and were well known to the said Gidney to be untrue, and were fraudulently made with a view of inducing Plaintiff, Chapple, to sign said deed of conveyance and execute said release; that the estate was truly worth Thirty Thousand ($30,000.00) Dollars, above all in-
160 debtedness; that the bank stock referred to was worth between Four and Five Thousand ($4000.00 and $5000.00) Dollars; that the said Gidney had not loaned the said Sarah Rawlings Five Thousand ($5000.00) Dollars, and that she was not indebted to him in such sum, and not justly indebted to him in any sum; that the interest in the hands of the administrator in Texas were not in doubt, nor liable to be obtained by the heirs of H. H. Rawlings; that such interests were certain, definite and fixed and vested in the estate of

Mrs. Rawlings; that said Gidney had been paid a sum more than sufficient to compensate him for the services rendered by him to Mrs. Rawlings; that the will aforesaid was not a good will in law, and this Defendant, Gidney, well knew, and that Plaintiff in law could defeat said will, and if he did, could get out of the estate, after paying his lawyers, very much more than Five Thousand ($5000.00) Dollars; that the Defendant, Gidney, was perfectly familiar with the estate of said Sarah Rawlings, and knew that the statements and representations he made to the Plaintiff, Chapple, were false, and well knew the said estate was worth Thirty or Forty Thousand ($30,000.00 or $40,000.00) Dollars.

Plaintiffs further aver that at the time Plaintiff, Sydney C. Chapple, made the alleged conveyance and executed said release, the Defendant, Gidney, well knew that the Plaintiff's mother Sarah Rawlings, at the time of the execution by her of said will, lacked the testamentary capacity and was mentally incapable of making a valid will, and well knew of her weak physical condition and of her inability to resist the suggestions and influence of those about her, and that he had taken advantage of her mental incapacity, her weakened condition and susceptibility to influence, and of the influence which he had over her by reason of his being her
161 attorney and legal adviser, which influence was irresistible, and had unduly influenced said Sarah Rawlings to make the will aforesaid, and to disinherit the Plaintiff, Chapple, and to make Defendant the beneficiary in said will; that the facts recited were, because of the youth, inexperience, lack of knowledge and absence from home much of the time preceding his mother's death, not known to the Plaintiff, Chapple, though well known to the Defendant, Gidney; that the Plaintiff, by reason of the facts, supposed that the will was executed and a valid instrument, and that he was without right to his mother's estate; that the Defendant, in pursuance of his original, fixed and continued purposes to defraud the Plaintiff, Sydney C. Chapple, by procuring from his mother by unlawful means and in the absence of testamentary capacity on her part, a will in Defendant's favor, and to cure the vice in such will by obtaining a conveyance of his interest from the Plaintiff, Chapple, and by inducing on his part further acts that could be pleaded as acts of estoppel, knowingly and fraudulently withheld and concealed from the Plaintiff, Sydney C. Chapple, the facts within the knowledge of the Defendant, Gidney, as above set out, and induced the Plaintiff to make the conveyance and execute the instrument of release under the impression that said will was valid, and that Plaintiff, Chapple, was without right in or to his mother's estate, except as in the will provided, and thus the Plaintiff, Chapple, was overreached and defrauded by the said Gidney, by reason of the confidence the Plaintiff, Chapple, had in him, and by his fraudulent representations and concealments as above alleged.

Plaintiffs further allege that at the time of the execution of said conveyance, on the 22nd day of June, 1906, the Defendant, Gidney, had in his hands money belonging to the estate of the said Sarah

Rawlings, largely in excess of the Five Hundred and Ten
162 ($510.00) Dollars paid to the Plaintiff, and that the same was the money of the Plaintiff, Sydney C. Chapple, and not the money of the Defendant, Gidney, and that the diamond ring and the diamond ear-bobs were the property of the Plaintiff Chapple, and not the property of the Defendant, Gidney, and for that reason Defendant, Gidney, did not pay him anything, but on the contrary there was a total failure of consideration for said conveyance and said instruments of release.

Plaintiffs further reppresent that if it were true that the Five Hundred ($500.00) Dollars received by the Plaintiff, Chapple, from Defendant, Gidney, was in fact the money of said Gidney, such sum was and is a totally inadequate consideration for the rights, properties and interests conveyed aforesaid; that the inadequacy was and is so gross as to shock the conscience.

Your petitioners further represent that on the 3rd day of July, 1906, the said instrument in writing, purporting to be the last Will and Testament of the said Sarah Rawlings, was exhibited to the United States Court for the Western District of the Indian Territory, at Muskogee, for probate, by the said Samuel E. Gidney, and the same was then and there probated in common form and letters testamentary thereon were granted to the Defendant, Samuel E. Gidney, the person named in said instrument of writing, to act as executor of the said purported Will, and the said Samuel E. Gidney, then and there qualified, and took upon himself the burden of executor of the said supposed Will of the said Sarah Rawlings, deceased.

Your petitioners represent that said Samuel E. Gidney procured the probate of said will in common form as aforesaid, in furtherance of, and as a part of, his scheme to acquire the property of the said Sarah Rawlings, and to defraud Plaintiff of the same,
163 for that, he thus procured the probate of said will in common form, without notice to the Plaintiff or other interested parties of such purpose to probate, and without knowledge on the part of Plaintiff, Chapple, of said proceeding. The said Samuel E. Gidney, as a lawyer, well knowing that if he offered said will for probate in solemn form, it would be necessary to notify the parties interested in said estate that said will had been offered for probate, and that they would thus have an opportunity to appear and contest the probating of such will. And the said Samuel E. Gidney fraudulently intended and designated, by offering the will for probate in common form, without notice or knowledge on the part of said Sydney C. Chapple of such proceedings, and without his being a party to such proceeding, and without his residing in, or being present in, the jurisdiction of the Court, to obtain advantage of said Sydney C. Chapple, and to prevent his contesting the said will, and to deprive him of the opportunity, as the said Samuel E. Gidney, understood and contends that the law then was and is to have said order probating said will in common form reviewed in appropriate proceeding, and of having the opportunity setting up the invalidity of said will as heretofore alleged.

That at the time said will was probated, as aforesaid, the Plaintiff, Sidney C. Chapple, resided out of that portion of Oklahoma which at that time was Indian Territory, and resided in the State of Missouri, and was not personally served with process and such action attempting to probate such will was taken without notice to him and without his actual appearance and the said Sydney C. Chapple did not in any manner of form enter his appearance in said proceedings, and was not a party thereto, and had not, at said time, made the contract with J. C. Scully, heretofore set out.

164 That as the said Sydney C. Chapple was absent from that portion of the State of Oklahoma, which was at that time Indian Territory, and was not personally served with process and such action was taken without his actual appearance and as he, the said Sydney C. Chapple, did not in any manner or form enter his appearance in said proceedings and was not a party thereto, he should be permitted to maintain this suit to set aside the said purported will and cancel the probate thereof in this action, and have the issue of devisavit vel non tried, even though no appeal was attempted to be taken from the said probate in common form, as the original complaint herein was filed within the statutory period of three years from the date of the said probate, to wit, on the 18th day of August, 1906.

Your petitioners further represent that in the event that this Court should decide that this Plaintiff, Sydney C. Chapple, could not maintain an action to set aside the said Will and cancel its probate, even though at the time the said purported Will was offered for probate, he was a non-resident of that portion of the State of Oklahoma, which was Indian Territory, and was not personally served with process and such action was taken without his actual appearance in said proceedings and was not a party thereto, for the reason that an appeal was not taken from the said probate, that this proceeding should be taken and considered as an appeal from the probate of the said purported will made by the said United States Court for the Western District of the Indian Territory, at Muskogee, and this cause tried as upon an appeal and the issue of devisavit vel non heard herein as on appeal.

165 That at the time of the probate of the said purported Will by the United States Court for the Western District of the Indian Territory, at Muskogee, there existed only one Court presided over by one Judge in the said Western District of the Indian Territory, which said Court was denominated, The United States Court for the Western District of the Indian Territory; that there was no separate and distinct Court of Probate and no separate and distinct Court of Equity, and that the same Court and the one Judge thereof performed all the duties and functions of a Court of Probate and of a Court sitting in Chancery; that no separate Probate Court for counties existed as there were no counties and that no statutory provision existed in said jurisdiction for an appeal from a Probate Court to a Court of Chancery and no procedure was provided by which an appeal could be taken.

That at the time of the probating of the said purported Will, an

appeal could not be taken from the said probate thereof, for the reason that there was no separate and distinct Court of Chancery to which to take an appeal and an appeal from one Court to another could not be taken, for the reason that at that time there was only one Court in existence in the said Western District, and the said Plaintiff, Sydney C. Chapple, was thereby precluded from attempting to take such an appeal.

That in the event that this Court should decide that this proceeding should not be treated as an appeal from the probate of the said purported Will, and in the further event that this Court should decide that the Plaintiff, Sydney C. Chapple, could not maintain this action to set aside the said purported Will and to cancel the probate thereof, for the reason that an appeal from the original probate thereof had not been taken, that in that event, these petitioners allege that the said Sydney C. Chapple is interested in the probate of the said purported Will and that he filed his original complaint in this action within five years after the probate thereof in the United States Court for the Western District, of the Indian Territory, at Muskogee, which said Court corresponded and was similar to the Circuit Court of a county in the State of Arkansas, in which said complaint he prayed that such Will be rejected and asked the said United States Court for the Western District of the Indian Territory to direct an issue to try the validity of such purported Will, and that therefore this Court as the successor of the said United States Court for the Western District of the Indian Territory, at Muskogee, should hereunder direct that the said issue of the validity of such purported Will, be at this time tried.

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Your petitioners allege that by reason of the fraudulent arts and practices resorted to by the Defendant, Samuel E. Gidney, in procuring said Will, and in procuring the probate thereof, in common form, without appearance and without the knowledge on the part of the Plaintiff of such proceeding, if denied any of the remedies herein asked, that Plaintiffs are by the fraud of Defendant, rendered wholly remediless to have such will set aside and held for naught, unless this Honorable Court takes jurisdiction and forms an issue to try the validity of said Will, which plaintiffs aver has already been adjudged an instrument made by Mrs. Sarah Rawlings, when lacking testamentary capacity.

Supplemental Complaint.

Your petitioners, by way of a supplemental complaint, allege that since the filing of the original complaint in this cause the following proceedings have been had in another action involving the same issue as that involved in this cause, namely; that on the 30th day of October, 1906, the Plaintiffs in this action, filed a suit in the United States Court for the Western District of the Indian Territory, at Muskogee, against Samuel E. Gidney, one of the Defendants herein, which said cause was entitled, "Sydney C. Chapple and J. C. Scully, Plaintiffs versus Samuel E.

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Gidney, Defendant", No. 7040 on the docket of the United States Court for the Western District of the Indian Territory, at Muskogee; that thereafter the District Court of Muskogee County, Oklahoma, became the successor of the said United States Court for the Western District of the Indian Territory, at Muskogee, and succeeded thereby to said cause; that the said action, No. 7040, as aforesaid, was between the same parties, except that the Defendants herein, Charity Dobbs and Sullivan Thorn, both of whom were duly served with process in this action and neither of whom plead, answered or demurred herein and default has been regularly entered against each of the said Charity Dobbs and Sullivan Thorn, herein, did not appear thereto, and involved the same subject matter as this suit, and that the issue of the validity of the purported Will sought to be cancelled and set aside in this cause, was regularly raised therein and was an issue, regularly tried and determined, in said action, and that the said action, No. 7040, as aforesaid, was tried before the District Court of Muskogee County, Oklahoma, and a decree and judgment rendered therein on the 27th day of June, 1908, in which it was found, among other findings: "That the Will executed by said Sarah Rawlings on the 23rd day of October, 1905, in which she virtually disinherited her son, Sydney C. Chapple, and left her estate to the Defendant, Samuel E. Gidney, is void, for the reason that the said Sarah Rawlings did not have sufficient testamentary capacity at the time of executing the same to make a fair and intelligent disposition of her estate."

168 And it was therefore decreed in said judgment and decree that the issues therein be adjudged in favor of the Plaintiffs; that said judgment and decree was appealed from in proper form by the said Defendant, Samuel E. Gidney, therein, to the Supreme Court of the State of Oklahoma; that thereafter on the 12th day of July, 1910, the said Supreme Court of the State of Oklahoma, affirmed the said judgment and decree; and that a mandate issued therefrom to the said District Court of Muskogee County, Oklahoma, and the same was thereafter spread of record in the said District Court of Muskogee County, Oklahoma; that by the said judgment and decree it was adjudicated that the said Sarah Rawlings did not have testamentary capacity on October 23, 1905, at the time the said purported Will was executed, and that the same was void and should therefore be cancelled; that as between the parties hereto, the same is a final adjudication of the issue and that the defendant, Samuel E. Gidney, cannot be heard at this time to deny that the said purported Will is void, and that the said Sarah Rawlings did not have testamentary capacity at the time of the execution thereof; that in the event that this Court should decide that the said findings is a final adjudication of the issue involving the validity of the said Will, that this Court should enter an order herein setting aside the same and cancelling the probate thereof without a further trial of this cause upon the facts.

That copies of the Plaintiffs' amended complaint in said cause, No. 7040, and the Defendant's answer thereto, and of the judgment and decree entered therein, are hereto attached and marked Plain-

tiff's Exhibits "C", "D", and "E", respectively, and made parts hereof.

169 Wherefore, the Plaintiffs pray that this Court find that there has been a final adjudication as to the validity of the Will excuted by Sarah Rawlings on October 23rd, 1905, in cause No. 7040 on the docket of the District Court of Muskogee County, Oklahoma, and that therefore the said Will is invalid and void, and that the said Sarah Rawlings died intestate and that the said Will an- the probate thereof be cancelled and set aside.

And in the event that this Court does not so find, then these Plaintiffs further pray, that this action be treated and considered as an appeal from the probating of the said purported Will, in common form, by the United States Court for the Western District of the Indian Territory, at Muskogee, and that an issue devisavit vel non be made and tried by a jury, de novo, as an appeal, and that judgment be rendered setting aside the probating of said Will, in common form, and declaring the said Will void and of no effect, and refusing its probate in solemn form;

And in the event that this Court should find that this action should not be treated as an appeal from the probate of the said purported will in common form, that then in that event, these Plaintiffs further pray, that the validity of said paper writing purporting to be the last Will and Testament of Sarah Rawlings be determined in this action, as on a contest of said purported Will, in Chancery, and that the same be adjudged invalid and void and that the said Sarah Rawlings died intestate, and for all such other and further relief as in equity Plaintiffs may be entitled to, together with the costs of this action; that an issue devisavit vel non be made, to be tried by a jury, and that judgment be rendered setting aside the probating of said Will and declaring the Will void and of no effect; that the said Samuel E. Gidney, executor under said pretended

170 Will, be required to account for all that portion of said estate which may have come into his hands, from any source whatever, and that he be required to pay to the plaintiffs herein any moneys that may have come into his hands, as executor of said estate, and for all such other and further relief as to the Court may seem proper.

YANCEY LEWIS,
N. B. MAXEY,
W. F. SCHUERMEYER,
CHAS. F. RUNYAN,
Attorneys for Plaintiffs.

STATE OF OKLAHOMA,
County of Muskogee, ss:

Sydney C. Chapple, being first duly sworn, states that he is one of the Plaintiffs in the above and foregoing complaint; that he has read the same and knows the contents thereof, and that the facts therein stated are true.

S. C. CHAPPLE.

Subscribed and sworn to before me this 19th day of April, 1911.

ELINA E. KLEIN,
Notary Public.

My commission expires July 11, 1913.

171 EXHIBIT "A."

INDIAN TERRITORY,
Western Judicial District, ss:

This contract entered into at Haskell, Indian Territory, this 3rd of August, 1906, by and between Sydney C. Chapple and J. C. Scully.

Witnesseth: That, Whereas, Sarah Rawlings, mother of the said Sydney C. Chapple, who recently died, leaving as her only heir the said Sydney C. Chapple, and an instrument purporting to be a Will of the said Sarah Rawlings has been admitted to probate in the U. S. District Court at Muskogee, I. T., in which instrument all the property, both real and personal of the said Sarah Rawlings has been devised and bequeathed to one Samuel E. Gidney, of Muskogee, I. T., which instrument is not the Will of the said Sarah Rawlings.

And Whereas, the said Sydney C. Chapple is desirous of contesting the said purported Will and for said purposes enters into this contract.

For and in consideration of One Dollar and legal services which have been and which will be hereafter furnished to the said Sydney C. Chapple in contesting the said purported Will, which legal services were furnished and will be hereafter furnished by the said J. C. Scully, who has retained W. F. Schuermeyer and other counsel to contest said purported Will as aforesaid and who has been paid and contracted for the further payment for the said legal services, the said Sydney C. Chapple does hereby grant, bargain, sell, convey, and transfer to the said J. C. Scully one-half interest in and to all the property owned by the said Sarah Rawlings or in which she had any right, title or interest at the time of her death and to which
172 the said Sydney S. Chapple became heir and legal owner, said property consisting of the following, to wit: Lots 7, 8, 9, and 10, Block 62, in the town of Haskell, I. T., with all improvements thereon, all personal property owned by the said Sarah Rawlings as per inventory on file in the U. S. District Court at Muskogee, I. T., stock evidence by certificate #214 of the National Exchange Bank of Dallas, Texas, and all interest of the said Sarah Rawlings in the estate of H. H. Rawlings, deceased, of which estate Lee Hughes of Dallas, Texas, is administrator, said estate consisting of real property situated in Ellis County, Texas, and in the City of Dallas, Texas, and other property and effects; and for the aforesaid consideration it is further agreed upon by both parties to this contract that the said J. C. Scully shall have and receive one-half (½) of all money or property, obtained by judgment of Court or by settlement of parties in the contest of said purported Will.

As a further consideration J. C. Scully agrees to advance and pay

all the Court costs required in the said contest, but it is also agreed that both parties to this contract are to pay equal share of said costs on the final adjustment of said contest.

Both parties to this contract agree to all the terms herein contained and in witness whereof now affix their hands hereto on this 3rd day of August, 1906, at Haskell, Indian Territory.

SYDNEY C. CHAPPLE.
J. C. SCULLY.

Witness to signature:
W. F. SCHUERMEYER.

173 INDIAN TERRITORY,
Western Judicial District, ss:

Before me, R. Brownbridge, a Notary Public, duly commissioned and acting as such in and for the above named District and Territory personally appeared Sydney C. Chapple, well known to me as the party designated as one of the parties to the foregoing deed and contract, and who acknowledged that he executed the same of his own free will and accord and for the purpose and consideration therein mentioned to which I certify.

In Witness Whereof I hereto affix my seal and hand as such Notary, this 3rd day of August, 1906.

[SEAL.] R. BROWNBRIDGE,
Notary Public.

My commission expires Nov. 14th, 1908.

174 EXHIBIT "B."

UNITED STATES OF AMERICA,
Indian Territory, Western District:

Will of Sarah Rawlings.

I, Sarah Rawlings, formerly Sarah Craig, of Haskell, Western District aforesaid, being of sound and disposing mind and memory, but sensible of the uncertainty of life, do hereby make, publish and declare the following to be my last will and testament, hereby revoking and declaring utterly void all other and former wills and testaments by me, at any time, made:

First:—My executor, hereinafter named, shall give my body a decent burial in my lot in Mount Holly Cemetery at Little Rock, Arkansas, beside a former husband of mine, Edward Chapple; the said lot having been deeded to me in my former name, Sarah Chapple; and shall erect at my grave a good monument, placing thereon my name, the date of my death and the date of my birth, which is May 10, 1865; and pay all funeral expenses, together with all my just debts out of the first money which may come into his hands belonging to my estate; the said funeral expenses and monument to be at the discretion of my executor; and he shall pay

himself whatever expenses he shall be put to in looking after the same, whether in traveling expenses or otherwise.

Second:—I give and bequeath to my only child, Sydney C. Chapple, Five Hundred ($500.00) Dollars, together with any debt which at the time of my decease shall be owing from him to me, together with any interest due thereon; the said sum of Five Hundred ($500.00) Dollars, to be paid my aforesaid son by the executor named herein at such times as in the discretion of my said executor he may feel that the condition of my said estate will warrant the same; but if my said son die before me, nor does not apply for the legacy herein within twelve months after my death, or does not in the said time accept the same in full of all interest and claim in my estate, then in either event, I give and bequeath the said legacy intended for him to my trusted friend, Samuel E. Gidney, of Muskogee, Indian Territory, his heirs, executors, administrators and assigns, absolutely forever. My said son has been the recipient of a considerable amount of money from me, and I have endeavored to win his love and affection and care, but he has signally failed to perform his filial duty towards me, and has been neglectful, wild and reckless, and has brought added sorrow to my life, and I pray that he may yet see the error of his ways and be saved under the Grace of God and yet be a blessing.

Third:—Whereas, I have not heard from an only brother of mine for ten (10) years or more, and have not heard from any of my relatives for many years;

Whereas, neither he nor they have ever manifested any interest in or care for me, and are strangers to me, and I do not desire that they nor their heirs receive anything from my estate;

And Whereas, Samuel E. Gidney, of Muskogee, Indian Territory, has been to me a true and trusted friend, and in many ways has contributed to my relief and comfort.

And Whereas, it is my desire that *they* shall be at least partially compensated therefor, I therefore, do hereby give, devise, bequeath all the rest, residue and remainder of my estate, real, personal and mixed and whatsoever kind, or wheresoever situated whereof I may be seized or possessed, or I might in any manner be entitled, or in which I may be interested at the time of my death, unto my worthy and trusted friend Samuel E. Gidney, and to his heirs, executors, administrators and assigns, absolutely forever, together with all of the hereditaments and appurtenances thereunto belonging or in any wise appertaining;

To Have and To Hold, The same to the said Samuel E. Gidney, his heirs and assigns forever. And if the said Samuel E. Gidney, dies before me, I give, bequeath and devise the legacies and devises intended for him to his heirs, executors, administrators or assigns, according as the same may be, real, or personal property.

Fourth. I hereby make, nominate and appoint and constitute Samuel E. Gidney, of the City of Muskogee, Indian Territory, Western District, my lawful executor to all intents and purposes,

to execute this my last will and testament according to the true intent and meaning of the same, and every part and clause thereof.

Fifth. In case of the death of my executor or of his resignation, incapacity or refusal to qualify and act, I hereby make, constitute, nominate, and appoint Benjamin Martin, Jr., of the City of Muskogee, Western District, Indian Territory, my lawful executor to all intents and purposes, to execute this my last will and testament, according to the true intent and meaning of the same.

In Witness Whereof, I, the said Sarah Rawlings, formerly Sarah Craig, have to this my last will and testament, consisting of three pages, subscribed my name and set my seal in the Western District, Indian Territory, on this 23rd day of October, 1905.

SARAH RAWLINGS. [SEAL.]

The foregoing instrument consisting of three pages, was on this the 23rd day of October, 1905, signed, sealed, published and declared by the Testatrix, Sarah Rawlings, formerly Sarah
177 Craig, to be her last will and testament, in the presence of each of us the undersigned each of whom is over the age of twenty-one years and who thereupon at her request and in her presence and in the presence of each other, have hereunto subscribed our names as attesting witnesses thereof, the day and year last above written.

Name: FRED V. MADDIN,
P. O., Muskogee, I. T.

Name: W. M. CHANDLER,
P. O., Muskogee, I. T.

Name: GEORGE McMILLAN,
P. O., Muskogee, I. T.

Signed in Maddin Building, Room 18, Muskogee, I. T.

Codicil to the Will of Sarah Rawlings.

I, Sarah Rawlings, of Haskell, Indian Territory, having made my last Will and Testament bearing date of October 23rd, 1905, the same having been witnessed by Fred V. Maddin, George McMillan, and W. M. Chandler, do now make this codicil to be taken as a part of the same.

First. I hereby ratify and confirm said Will in every respect, save so far as any part if it is inconsistent with this codicil.

Second. I give and bequeath to Mrs. Charity Dobbs of Haskell, Indian Territory, who has been a kind nurse to me, the sum of Fifty ($50.00) Dollars.

Third. I have recently heard from my brother Sullivan Thorn, of Senoraville, Georgia, and in case he or any one for him in his family will accept the same, I give, and bequeath to my said brother, Sullivan Thorn, all of my dresses, cloaks, clothing and such wearing apparel

In Witness Whereof, I, Sarah Rawlings, have to this codi-
178 cil to my last Will and Testament, subscribed my name and set my seal on this 13th day of April, 1906.

SARAH RAWLINGS. [SEAL.]

Witnesses:
D. B. McARTHUR,
P. O., Haskell, I. T.
RALPH DRESBACK,
P. O., Haskell, I. T.

179 EXHIBIT "C."

Omitting Caption.

Amended Complaint.

To the Honorable William R. Lawrence, Judge of the United States Court for the Western District of the Indian Territory, at Muskogee, in Chancery Sitting:

Come now plaintiffs, Sydney C. Chapple and J. C. Scully, and by leave of the Court amend their complaint so that the same shall read as follows:

Plaintiffs, Sydney C. Chapple and J. C. Scully, of the Western District of the Indian Territory, respectfully represent unto your Honor that the defendant, Samuel E. Gidney, is a resident of the Western District of the Indian Territory, and that the subject matter of this suit is situated in the Western District of the Indian Territory.

Plaintiffs further represent that the plaintiff, Sydney C. Chapple, was and is the sole heir-at-law of Sarah Rawlings, deceased, formerly Sarah Craig, and that prior to her marriage with H. H. Rawlings the said Sarah Rawlings was the wife of Edward Chapple, now deceased, who was the father of the Plaintiff, Sydney C. Chapple, as the said Sarah Rawlings was his mother, and that said Sarah Rawlings departed this life on or about the 16th day of June, 1906, at Haskell, in the Western District of the Indian Territory, of which she was a resident; that she died intestate, leaving as her sole heir-at-law the plaintiff, Sydney C. Chapple.

Plaintiffs further represent that *the* the time of the death of the said Sarah Rawlings she was seized and possessed of a large amount of real estate and personal property, consisting of farm lands in Ellis County, Texas, of the value of Ten Thousand Dollars ($10,000.00); also farm land in Scurry County, Texas; Fisher County, Texas; Nolan County, Texas, and Reeves County, Texas, of the value of, at
180 least Fifteen Thousand Dollars ($15,000.00); Also town lots in the town of Pecos and Dallas, Texas, of the value of Nine Thousand Dollars ($9,000.00), and personal property in the State of Texas consisting of seventeen shares of the capital stock of

the American Exchange National Bank of Dallas, Texas, and worth about four or five Thousand Dollars, and other stock in corporations in the state of Texas, the exact value of which is to the plaintiffs unknown.

That said Sarah Rawlings also died seized and possessed of the following real estate situated in the Town of Haskell, in the Western District of the Indian Territory, described as follows:

Lots Seven (7), Eight (8), Nine (9), Ten (10), in Block Sixty-two (62), in the town of Haskell, Indian Territory, with all improvements thereon, and of the reasonable value of four thousand dollars ($4,000.00); that said Sarah Rawlings has left personal property in the Western District of the Indian Territory consisting of household and kitchen furniture, piano, silverware, jewelry, diamonds, etc., and one horse and buggy and other personal property of the value of Twenty-five Hundred ($2,500.00) Dollars, making her estate of the value of Thirty-six Thousand Five Hundred ($36,500.00) Dollars or more.

Plaintiffs further represent that since the death of the said Sarah Rawlings the plaintiff, Sydney C. Chapple, has, for a valuable consideration, conveyed an undivided one half interest in the estate of the said Sarah Rawlings to the plaintiff J. C. Scully; a copy of said conveyance is hereto attached marked Exhibit "A."

Plaintiffs further represent that for a year or more preceding her death the said Sarah Rawlings was in an exceedingly bad state of health; that she was physically exceedingly weak, reduced
181 and emaciated, which condition, of course, became more pronounced as she approached the period of her dissolution; that during the time she was suffering from a severe and incurable disease which became more and more pronounced; that her nervous system was practically wrecked; that her will power during all of this time was so reduced that she became unable to resist the influence or suggestions of any person about her for a short space of time, and seeking to influence her actions; that her mind became impaired and deranged to such an extent as to make her wholly incapable *to* making a valid will; that her judgment and ability to transact business and handle her affairs properly was utterly gone; that she became susceptible to the slightest influence of those about her, and easily pliable in their hands; that in particular she became easily subject to the influence and suggestions of lawyers and Doctors whom she employed in a professional way; that she reached a condition that she had not sound and disposing mind and memory, but was so weak and feeble from ill health and her mind and memory so impaired, and she was so easily subject to suggestions and influence of those about her as to render her wholly incapable of making a valid will, or a just and proper distribution of her estate.

That while she was in this condition she became acquainted with the defendant, Samuel E. Gidney, who was a lawyer by profession; said defendant perceiving her condition, and realizing her incapacity and her susceptibility to the influence of those about her, especially of her professional advisers, and knowing that she could not live but

a few months, conceived the idea of defrauding the plaintiff Chapple out of his right and interest in his mother's estate and of depriving him of what would have come to him from such estate as
182 sole heir-at-law of the said Sarah Rawlings, and thereupon proceeded to take advantage of his professional relations and of the confidence it inspired, and of the reduced condition of the said Sarah Rawlings, mentally and physically, to work upon her and influence her by arts and suggestions to disinherit the plaintiff, and to make the defendant the beneficiary in her will.

Defendant, in order to induce the said Sarah Rawlings to execute a will in his favor, took advantage of his confidential position and relation as attorney and legal adviser of the said Sarah Rawlings, and poisoned her mind and alienated her affections from the plaintiff, Sydney C. Chapple, and her other relatives, including a brother and nieces, by false and fraudulent statement as to what he was doing for her, and how little your petitioner, Sydney C. Chapple, and her other relatives cared for her, and how badly said Sydney C. Chapple had acted and was acting and thus on or about the 23rd day of October, 1905, induced the said Sarah Rawlings to execute a certain instrument in writing, purporting to be her last will and testament, whereby she bequeathed all of her estate, both real and personal as follows: To Sydney C. Chapple, who is one of the plaintiffs, Five Hundred Dollars, with any debt which he may be owing to the said Sarah Rawlings at the time of her death; To Samuel E. Gidney, Defendant herein, and his heirs and assigns forever, all of the rest, residue and remainder of her estate, real, personal and mixed, of whatsoever kind, and wheresoever situated, whereof she may die seized or possessed, or having an interest in at the time of her death, which property consisted of real estate, bank stock, cash on hand and personal property of the value of thirty thousand dollars ($30,000.00) or more, and thereafter, towit, on the 13th day of April, 1906, said Sarah Rawlings executed an instrument in writing, purporting to be a codicil of her aforesaid will, and under and by said purported codicil professedly bequeathed to Charity
183 Dobbs the sum of Fifty ($50.00) Dollars, and to her brother, Sullivan Thorn, of Senoraville, Georgia, all of her dresses, cloaks, clothing and such wearing apparel. A copy of said pretended Will is hereto attached, marked Exhibit "B."

That the defendant Gidney, at the time such will was executed, had obtained such complete control over the mind of said Sarah Rawlings as to render her incapacitated to know what she was doing at the time she executed the said purported Will, and exerted an undue influence upon her, she being at the time so much under his arts and influence as to be incapable of doing any other than that which he advised, and thus, by means of such influence, induced her to execute the will aforesaid at the time she lacked mental capacity to make the will, and when she would not have made this will but for such undue influence of the defendant, Gidney, as aforesaid.

Plaintiffs represent that the plaintiff, Sydney C. Chapple, has been for about one year absent from home, and away from his mother;

that he was youthful, inexperienced in business matters, uninformed as to legal rules, ignorant of the law and its procedure; that he knew that the defendant Gidney had been his mother's adviser and was familiar with the condition of her estate; that because of the fact that the defendant, Gidney, had acted as his mother's adviser and was familiar with the condition of her estate; that because of the fact that the defendant, Gidney, had acted as his mother's lawyer that plaintiff, Chapple, had confidence in him, and believed his statements and representations that a few days after his mother's death, of which he was advised by telegram from the defendant, Gidney, plaintiff, Chapple, came to the office of said defendant in Muskogee.

That said defendant, as part of his original purpose to defraud plaintiff, Chapple, and to secure his estate, knowing that the
184 will aforesaid was invalid for the reason above stated, and knowing as a lawyer that the same could be set aside and avoided, and knowing that it would be necessary to secure from the plaintiff other instruments of conveyance, or release of his rights or acts of estoppepl to set up the same, and in pursuance of his original purpose to defraud this plaintiff, and in continuation of his plan, or scheme, by which such fraud would be made successful, made various misrepresentations, and was guilty of many acts of concealment when plaintiff came to his office as aforesaid. He represented to plaintiff that Sarah Rawlings, his mother, had made a will wherein she had disinherited him, the said Sydney C. Chapple, and conveyed, devised and bequeathed all of her property, of every kind and character, to him the said defendant; that the will was a good will in law, and plaintiff could not defeat it, and if he did he would not get as much out of the estate, after paying his lawyer's fee, as Five Hundred ($500.00) Dollars.

That he, Gidney, would have every advantage of him in any suit to set aside the will, because, being a lawyer, he could conduct the case without expense; that with reference to the interest that was still in the hands of the administrator in Texas it was not certain whether the heirs of H. H. Rawlings, deceased, the husband of Mrs. Sarah Rawlings, would not come in and get the same; that if plaintiff should contest the will it would take three or four years to bring the matter to such a stage that the plaintiff, Sydney C. Chapple, could get any money from his mother's estate. The defendant, Gidney, further represented that the said Sarah Rawlings left very little property; that she had made some bad investments, and that she owed some very heavy bills including an indebtedness of Five Thousand ($5,000.00) Dollars, for money which he, Gidney, had loaned her, and for his services rendered. That after the
185 debts were paid there would be very little left, probably not enough to pay his, Gidney's, fees; that there would not be more than Seven Hundred to One Thousand ($700.00 to $1,000.00) Dollars, at the outside, left after the payment of the debts; that the bank stock owned by her was worth Seventeen Hundred Dollars ($1,700.00); that the total estate, not counting the debts, would not

be worth more than six or seven thousand dollars ($6,000.00 or $7,000.00.)

That the defendant, Gidney, then said that he was willing to divide what Mrs. Rawlings had left with plaintiff, and would give him Five Hundred Dollars ($500.00) if plaintiff would convey to him, Gidney, all his right, title and interest. The defendant, Gidney, had already loaned plaintiff ten dollars ($10.00.) Plaintiff requested, in addition to the five Hundred Dollars ($500.00), the diamond ring and a pair of diamond ear bobs that belonged to his mother in her lifetime, and that the defendant agreed to let him have them, and subsequently delivered them to him; that plaintiff agreed to this proposition, and on the 22nd day of June, 1906, he executed to the said Samuel E. Gidney an instrument in writing conveying all of his right, title and interest in his mother's estate to the defendant, Gidney, said deed reciting a consideration of Five Hundred and Ten ($510.00) Dollars, a large diamond ring and a pair of ear bobs, which some time thereafter were delivered to the plaintiff. At the same time an instrument was prepared by the defendant, Gidney, and executed by plaintiff, Chapple, in its nature a receipt, release, and acquittance by plaintiff, Sydney C. Chapple, as devisee and legatee under the will of said Sarah Rawlings, in favor of the defendant, Gidney, as executor of her will for a purported consideration of Five Hundred ($500.00) Dollars
186 paid to plaintiff, but in truth and in fact no consideration whatever was paid for said release. Copies of said conveyance and release are hereto attached, marked Exhibits "C" and "D," respectively.

Plaintiffs further represent that at the time said deed and release were made the plaintiff, Chapple, believed the representations of defendant, Gidney, to be true and relied upon the same; that he was ignorant of the facts of the mental incapacity of said Sarah Rawlings, and the undue influence as hereinbefore alleged; that he was ignorant of his right and ability to set aside said will under the law, and relied upon the legal judgment and opinion of the defendant, Gidney; that because of his absence from his mother's home plaintiff was not informed about his mother's property rights, or of her subsequent condition, but knew that defendant, Gidney, had been his mother's legal adviser for some time and was familiar with her estate and financial and personal condition, and believed the statements of said defendant, Gidney, to be true, and relied thereupon, and because of his belief in same he executed the deed and release above mentioned.

Plaintiffs allege that such representations were not true, and were well known to the said Gidney to be untrue, and were fraudulently made with a view of inducing plaintiff, Chapple, to sign said deed of conveyance and execute said release; that the estate was truly worth thirty thousand dollars ($30,000.00) above all indebtedness; that the bank stock referred to was worth between four and five thousand dollars ($4,000.00 and $5,000.00); that the said Gidney had not loaned the said Sarah Rawlings five thousand dollars ($5,000.00), and that she was not indebted to him in such sum, and

not justly indebted to him in any sum; that the interests in the hands of the administrator in Texas were not in doubt, not liable to be obtained by the heirs of H. H. Rawlings; that such
187 interests were certain, definite and fixed and vested in the estate of Mrs. Rawlings; that said Gidney had been paid a sum more than sufficient to compensate him for the services rendered by him to Mrs. Rawlings; that the will aforesaid was not a good will in law, and this defendant, Gidney, well knew, and that plaintiff in law could defeat said will, and if he did, could get out of the estate, after paying his lawyers, very much more than five thousand dollars ($5,000.00); that the defendant, Gidney, was perfectly familiar with the estate of said Sarah Rawlings, and knew that the statements and representations he made to the plaintiff, Chapple, were false, and well knew the said estate was worth thirty or forty thousand dollars ($30,000.00 or $40,000.00.)

Plaintiffs further aver that at the time plaintiff, Sydney C. Chapple, made the alleged conveyances and executed said release the defendant, Gidney, well knew that the plaintiff's mother, Sarah Rawlings, at the time of execution by her of said will, lacked the testamentary capacity and was mentally incapable of making a valid will, and well knew of her weak physical condition and of her inability to resist the suggestions and influence of those about her, and that he had taken advantage of her mental incapacity, her weakened condition and susceptibility to influence, and of the influence which he had over her by reason of his being her attorney and legal adviser, which influence was irresistible, and had unduly influenced said Sarah Rawlings to make the will aforesaid, and to disinherit the plaintiff, Chapple, and to make defendant the beneficiary in said will; that the facts recited were, because of the youth, inexperience, lack of knowledge and absence from home much of the time preceding his mother's death, not known to the plaintiff, Chapple, though well known to the defendant, Gidney; that the plaintiff, by reason of the facts, supposed that the will was executed was a valid instrument, and that he was without right to his mother's
188 estate; that the defendant, in pursuance of his original, fixed and continued purposes to defraud the plaintiff, Sydney C. Chapple, by procuring from his mother by unlawful means and in the absence of testamentary capacity on her part a will in defendant's favor, and to cure the vice in such will by obtaining a conveyance of his interest from the plaintiff, Chapple, and by including on his part further acts that could be pleaded as acts of estoppel, knowingly and fraudulently withheld and concealed from the plaintiff, Sydney C. Chapple, the fact within the knowledge of the defendant, Gidney, as above set out, and induced the plaintiff to make the conveyance and execute the instrument of release under the impression that said will was valid, and that plaintiff, Chapple, was without right in or to his mother's estate, except as herein provided, and thus the plaintiff, Chapple, was overreached and defrauded by the said Gidney by reason of the confidence the plaintiff, Chapple, had in him, and by his fraudulent representations and concealments as above alleged.

Plaintiffs further allege that at the time of the execution of said conveyance, on the 22nd day of June, 1906, the defendant, Gidney, had in his hands money belonging to the estate of the said Sarah Rawlings, largely in excess of the five hundred and ten — ($510.00) paid to the plaintiff, and that the same was the money of the plaintiff, Sydney C. Chapple, and not the money of the defendant, Gidney, and that the diamond ring and the ear bobs were the property of the plaintiff, Chapple, and not the property of the defendant, Gidney, and for that reason defendant, Gidney, did not pay him anything, but on the contrary there was a total failure of consideration for said conveyance and said instrument of release, and plaintiffs are not therefore required to return said money, ring and ear bobs.

Plaintiffs say that if it should be shown upon the hearing that the five hundred ten dollars ($510.00) received by the plaintiff, Chapple, from the defendant, Gidney, was not money be-
189 longing to the estate of Sarah Rawlings, but was money of the defendant, Gidney, that plaintiffs are willing to do equity, and will, upon the establishment of such facts by this court, repay such money with interest to the said Gidney, and are willing to have the relief awarded them by the Court herein made subject to such repayment within a time fixed by the court.

Plaintiffs further represent that if it were true that the five hundred dollars ($500.00) received by the plaintiff, Chapple, from defendant, Gidney, was in fact the money of said Gidney, such sum was and is a totally inadequate consideration for the rights, properties and interests conveyed aforesaid; that the inadequac*h* was and is so gross as to shock the conscience.

Premises considered, plaintiffs pray that said conveyance by said Sydney C. Chapple to said Samuel E. Gidney, be cancelled by the decree of this court, set aside and held for naught; that the said instrument of release, except as it purports to be a receipt for money, be cancelled by decree of this court, set aside and held for naught; that the said Samuel E. Gidney be required by said decree to reconvey all of said property described in said conveyance to plaintiffs within an early day, to be fixed by the Court, and upon his failure to do so that the master in chancery of this court be ordered and directed to execute a good and sufficient conveyance to all of said property to plaintiffs, and upon such conveyance being made by said master in chancery that it shall have the effect of divesting said Samuel E. Gidney of all title or interest in said property, and of vesting the same in plaintiffs, and that the defendant, the said Samuel E. Gidney, be decreed to pay the costs of this suit, and the plaintiffs further pray for such other and further relief in
190 the premises as to your Honor shall seem meet and equitable.

LEWIS & PHILLIPS,
W. F. SCHUERMEYER,
RAYMOND, MAXEY & RUNYAN,
Attorneys for Complainants.

J. C. Scully, being first duly sworn upon oath, states that he is one of the plaintiffs in the above styled cause, and that he has read the above and foregoing amended complaint, and that the matters and things contained therein are true.

J. C. SCULLY.

Subscribed and sworn to before me this 7th day of February, 1907.

CHARLES L. TOOR,
Notary Public.

My commission expires November 18th, 1908.

Plaintiffs' Exhibit "C."

191 "EXHIBIT D."

Omitting Caption.

Answer to Amended Complaint.

Defendant, in answer to the amended complaint filed herein, admits that all said parties are residents of the Western Judicial District of Indian Territory, but denies that the subject matter of this suit is situated in the Western District of the Indian Territory.

Defendant admits that if Sarah Rawlings, deceased, died intestate, the plaintiff, Sydney C. Chapple, was and is her sole heir-at-law, and denies that Edward Chapple was the father of Sydney C. Chapple, and admits that Sarah Rawlings was his mother, and that she departed this life on or about the 15th day of June, 1906, at Haskell, in the Western District, and denies that she died intestate.

Defendant further denies that at the time of the death of the said Sarah Rawlings she was seized and possessed of a large amount of real estate and personal property consisting of farm lands in Ellis County, Texas, of the value of ten thousand dollars; also farm lands in Scurry County, Texas; Fisher County, Texas; Nolan County, Texas, and Reeves County, Texas, of the value of at least $15,000.00; also town lots in the towns of Pecos and Dallas, Texas, of the value of $9,000.00, and personal property in the State of Texas consisting of seventeen shares of the capital stock of the American Exchange National Bank of Dallas, and worth about four or five thousand dollars, and other stock in other corporations in the State of Texas.

Defendant admits that Sarah Rawlings died seized and possessed of real estate in the town of Haskell, in the Western District of the Indian Territory, described as follows: Lots seven, eight, nine, and ten, in block sixty-two in the town of Haskell, Indian Territory, with improvements thereon, but defendant denies that the
192 reasonable value of the same is four thousand dollars.

Defendant admits that Sarah Rawlings has left personal property in the Western District of the Indian Territory, consisting of household and kitchen furniture, piano, silverware, etc., and one horse and buggy, and other personal property, but denies that the

value of the same is two thousand five hundred dollars; and defendant further denies that the value of her estate is thirty-six thousand five hundred dollars, or more.

As to whether the plaintiff, Sydney C. Chapple, has conveyed an undivided one half interest in the estate of the said Sarah Rawlings to the plaintiff, J. C. Scully, or that he is now the joint owner of the same with the said Sydney C. Chapple, this defendant has not sufficient information on which to found a belief and therefore denies the same, but alleges that if any such purported sale was made the consideration therefor is illegal and void and of no value and effect, for the reason that it is champertous and against the policy of the law, the consideration therefor being to employ counsel, the payment of costs by the said J. C. Scully, the receipt of the same by the said Sydney C. Chapple for the purpose and intention on the part of said parties to promote litigation, stir up strife and is speculative in its nature, all of which is shown by Exhibit "A," attached to plaintiffs' amended complaint, and for this reason this suit should abate.

Defendant further admits that for a year or more preceding the death of the said Sarah Rawlings she was in a bad state of health, and was physically weak, and that this condition became more pronounced as she appro-ched death; that she was suffering from an incurable disease, which became more pronounced, but denies that said disease affected her nervous system or her will power, or that she became unable to resist the influence or suggestions of
193 any person about her seeking to influence her actions, or that her mind became impaired or deranged to such an extent as to make her wholly incapable of making a valid will, or that her judgment and ability to attend to business and to handle her affairs properly was utterly gone, or that she became susceptible to the slightest influence of those about her, and easily pliable in their hands, or that she became easily susceptible to the influence of lawyers and doctors whom she had employed, or that she reached a condition that she had no sound and disposing mind and memory, or that she was so weak and feeble from ill health and her mind and memory so impaired and was so easly subject to the suggestions and influences of those about her as to render her wholly incapable of making a valid will, or a just and proper distribution of her estate.

The defendant admits that he is a lawyer by profession, but denies that he conceived the idea of defrauding the plaintiff, Chapple, out of his right and interest in his mother's estate, or of depriving him of what would have come to him from such estate as the sole heir-at-law of Sarah Rawlings, or proceeded to take advantage of his professional relations, or of the confidence it inspired, or of the reduced condition of the said Sarah Rawlings mentally or physically for the purpose of working upon her, or to influence her by arts and suggestions, or to disinherit the plaintiff, and to make the said defendant the beneficiary in her will.

He denies that he took advantage of any confidential position or relation as attorney or legal adviser of the said Sarah Rawlings to induce her to execute her will in his favor, or poison her mind, or

alienate her affections from her son or her other relatives by false and fraudulent statements as to what he was doing for her, or how little her son and other relatives cared for her, or how badly
194 her son had or was acting, or that he thereby induced the said Sarah Rawlings to execute an instrument in writing on October, 23rd, 1905, purporting to be her last will and testament, whereby she bequeathed all of her estate, both real and personal, as therein set out, and denies that said property was of the value of thirty thousand dollars or more, and admits that on the 13th day of April the said testatrix executed a codicil to her aforesaid will, a true copy of which, as well as said will, is practically set out as Exhibit "B" in plaintiffs' amended complaint; he denies that he exercised any undue influence or used any undue means whatsoever in the procurement of said will, or of said codicil.

Defendant denies that he had obtained such complete control over the mind of the said Sarah Rawlings at the time of the execution of said will as to render her incapacitated to know what she was doing at the time she executed said will, or that she was so much under his arts and influence as to be incapable of doing any other than just what he advised, or by undue means induced her to execute the will aforesaid at the time she lacked the mental capacity to make the will, or when she would not have made the will but for such undue influence.

Defendant denies that plaintiff, Sydney C. Chapple, had been absent for about one year from home, or away from his mother, or that he was youthful and inexperienced in business matters, uninformed as to legal rules, or ignorant of the law or its procedure.

Dfendant denies that by reason of the fact that the defendant was acting as his mother's lawyer he had great confidence in him and believed his statements and representations, and admits that a few days after his mother's death he came to the office of said defendant in Muskogee, after having been advised of his mother's death
195 by defendant, but denies that plaintiff knew that defendant was familiar with the condition of his mother's estate.

Defendant denies that as a part of his original purpose and to secure said estate, or in pursuance of his original purpose to defraud plaintiff and in continuation of his plan or scheme by which such fraud would be made successful, made various misrepresentations and was guilty of many acts of concealment when plaintiff came to his office, or represented to plaintiff that his mother had made a will disinheriting him and devising all of her property to this defendant, or that the will could not be defeated by the plaintiff, or if he did defeat the will he would not get as much out of the estate after paying his lawyer's fees as five hundred dollars.

Defendant denies that he stated to the plaintiff, Chapple, that he would have every advantage of him in any suit to set aside the will because, being a lawyer, he could conduct the case without expense, that it was not certain whether the heirs of H. H. Rawlings would not come in and get the estate in Texas, or that if plaintiff would contest the will it would take three or four years to bring the matter to such a stage that plaintiff could get any money from his mother's

estate, or that defendant represented that Sarah Rawlings left very little property, or that she had made some bad investments, or that she owed some very heavy bills, including an indebtedness of five thousand dollars, to himself for money loaned her and for his services rendered, or that after the debts were paid there would be very little left, probably not enough to pay defendant's fees, or that there would not be more than seven hundred or one thousand dollars at the outside left after the payment of the debts, or that the bank stock was worth seventeen hundred dollars, or that the total
196 estate, not counting the debts, would not be worth more than six or seven thousand dollars.

Defendant denies that he stated to plaintiff, Chapple, that he was willing to divide what Mrs. Rawlings had left with him and would give him five hundred dollars if plaintiff would convey all his right, title and interest to him. He denies that plaintiff requested in addition to the five hundred dollars the diamond ring and diamond ear bobs that belonged to his mother, but states the fact to be that said proposition was made by the defendant, and agreed upon between them, and admits that said property was delivered to plaintiff, and admits that plaintiff executed to defendant an instrument in writing conveying all of his right, title and interest in his mother's estate to the defendant, reciting a consideration of five hundred and ten dollars, a large diamond ring and a pair of diamond ear bobs; and at the same time an instrument was executed by plaintiff in its nature a receipt, release and acquittance as devisee and legatee under the will of said Sarah Rawlings in favor of the defendant as executor of her will for a purported consideration of five hundred dollars paid to plaintiff, but denies that no consideration was paid for said release and states that a good and valuable consideration was paid therefor, and that said release and acquittance was executed to the defendant in his individual capacity as well as executor.

He denies that at the time said deed and release were made that plaintiff believed the representation to be true, or relied upon the same, or that he was ignorant of the facts of the mental incapacity of the said Sarah Rawlings, and admits that he was ignorant of undue influence or the mental incapacity of his mother, or of his ability to set aside her will, and states the fact to be that there was no undue influence of which he could have knowledge, or that his mother was mentally incapable of making said will, and de-
197 nies that he relied upon the legal judgment and opinion of the defendant, Gidney, or was ignorant of his right, to set aside his will if he had any grounds therefor; denies that he was not informed about his mother's property rights, or of her subsequent condition or that he believed the statements of said defendant and relied upon them, and because of his belief in the same executed the said deed and release.

Defendant denies that he knew that he was familiar with his mother's estate and financial and personal condition, and denies that he made such representation, or that they were fraudulently made with a view of inducing plaintiff to sign said deed and execute said release. He denies that said estate was worth thirty thousand

dollars above all indebtedness, or that the bank stock was worth four or five thousand dollars. He admits that he had not loaned the said Sarah Rawlings five thousand dollars, but denies that she was not indebted to him in any sum, and denies that the defendant had been paid a sum more than sufficient to compensate him for the services rendered for the testratrix, and denies that said will was not a good will in law, or that the defendant knew that fact, and that plaintiff could in law defeat said will, and if he did, could get out of the estate, after paying his lawyers, very much more than five thousand dollars. Defendant denies that he was perfectly familiar with the estate of said Sarah Rawlings, or knew the statements and representations that he made to the plaintiff were false, or knew that said estate was worth thirty or forty thousand dollars.

He denies that he knew at the time of the making of said conveyance and release that Sarah Rawlings, at the time of the execution of her will, lacked testamentary capacity, and was mentally incapable of making a valid will, and of her inability to resist the suggestions and influence of those about her, and that he had taken advantage of her mental incapacity, of her weakened condi-
198 tion and susceptibility to influence and of the influence he had over her by reason of being her attorney and legal adviser, and denies that such influence was irresistable or knew that he had unduly influenced her to make the will and to disinherit the plaintiff, and to make defendant the beneficiary in said will, and denies that the true condition of the testratrix and of her affairs and of defendant's relation to her was unknown to the plaintiff.

Defendant states that the plaintiff, Chapple, is not a youth, but a full grown man, twenty-seven years of age, and had been in business for a number of years prior to the execution of said release and deed, and had a large business experience, familiarizing himself with business transactions, and was more familiar with his mother's affairs than was the defendant.

Defendant denies that he pursued any original, fixed and continued purpose to defraud the plaintiff in any manner, or knowingly or fraudulently withheld or concealed from the plaintiff any facts within his knowledge concerning said estate or the true condition of his mother prior to her death, or any fact in relation to the procurement of said will or induced the plaintiff to execute the release and conveyance under the impression that he was without right in and to his mother's estate, except as provided in said will, and denies that he was over reached and defrauded by defendant by reason of the confidence he reposed in him, or by his fraudulent representations and concealments, or that he procured said release and conveyance to cure any vice in said will.

The defendant denies that at the time of the execution of said conveyance he had money in his hands belonging to the estate largely *and* in excess of five hundred and ten dollars, and that
199 the money paid to the plaintiff, Chapple, was his money, and not the money of the defendant, Gidney, and denies that the diamond ring and the ear bobs were the property of the plaintiff,

and not the property of the defendant, Gidney, or that there was a total failure of consideration on said conveyance and release.

Defendant states that the money paid by him to the plaintiff in consideration of said release and conveyance was the property of the defendant, and not the property of said estate of the plaintiff, and that the same had never been returned to him or tendered to him by the plaintiff, Chapple, or any one in his behalf, prior to the bringing of this suit; or at any time.

Defendant denies that the consideration for said release and conveyance is totally inadequate or that it is so gross as to shock the conscience.

II.

For further answer, defendant alleged that said release and acquittance and the conveyance were made and executed in full settlement and compromise of all the rights and interests of the said plaintiff, Chapple, as heir and legatee and devisee to his mother's estate, and was made with full knowledge after due consideration of all the facts in relation to his status under the will and surrounding the execution of the same, and all facts in relation to his mother's estate known to the defendant, and upon due deliberation and without any misrepresentation or fraud practiced upon him by the defendant, and for a valuable consideration and to avoid any litigation then threatened by the said plaintiff in relation to said will, or said estate.

—.

For further answer defendant alleges that prior to the commencement of this suit there was then pending and still is pending, in this court a suit involving the subject matter of said will and its execution and the validity thereof, being the same subject matter involved in this action so far as said will is concerned, between
200 the same parties thereto, and which suit is undisposed of, and is pending in this court, a court having complete and full jurisdiction of the parties thereto, and the subject matter of said suit, and the matters pleaded in plaintiff's bill in this suit in relation to the execution of the will described therein, and all the acts and doings in relation thereto charged against this defendant as well as the undue influence and fraud charged are involved in the other suit, and the plaintiffs are thereby barred from prosecuting this suit, in relation to said will as involving the same issues involved in the former suit.

IV.

For further answer defendant states that plaintiffs are estopped from setting aside said deed of conveyance and release for the reason that they have not returned or offered to return the money paid to said plaintiff, Sydney C. Chapple, as a consideration in said settlement, but have retained the same and ratified the settlement so made, and have performed no act prior to the bringing of this suit to rescind said contract or disaffirm the same, and neither of said plaintiffs have demanded, prior to the bringing of this suit, a rescis-ion of said con-

tract or offered to restore the consideration money paid by the defendant for securing said conveyance and release and acquittance.

Wherefore, premises considered, defendant prays that the said cause may be dismissed as to him; that he may have and recover his costs, and for all other proper relief in the premises.

HUTCHINGS, MURPHY & GERMAN,
Attorneys for Defendant.

201 UNITED STATES OF AMERICA,
Indian Territory, Western District, ss:

Samuel E. Gidney, being first duly sworn, upon oath states that he is the defendant in the above entitled cause and that he has read the foregoing answer to amended complaint, and that the matters and things contained therein are true.

SAMUEL E. GIDNEY.

Subscribed and sworn to before me this 15th day of March, 1907.

MINNIE P. DUMAS,
Notary Public.

My commission expires Jan. 17th, 1911.

Plaintiffs' Exhibit "D."

202 "EXHIBIT E."

Omitting Caption.

Decree.

Now, on this 27th day of June, 1908, this cause coming on for final hearing upon the amended complaint of the plaintiffs, and answer of the defendant, and report of the master in chancery, and all the evidence and the exceptions thereto, and the court having heard the pleadings read and report of the master in chancery, and read the evidence taken before said master and the exceptions to said report, and the argument of counsel, and being well and sufficiently advised in the premises, doth find that the exceptions to the master's report are well taken, and the same are sustained, and the court makes the following findings and decree:

I.

The court finds that the conveyance and the release executed by the plaintiff, Sydney C. Chapple, to the defendant, Samuel E. Gidney, on the 22nd day of June, 1906, were obtained by the said Gidney, by fraudulent representation, and by a failure to disclose knowledge in his possession in relation to the estate of Sarah Rawlings, which — was his duty to disclose.

II.

The court further finds that the defendant, Samuel E. Gidney, had at the time of the execution of said instruments been the attorney for Sarah Rawlings, the mother of the plaintiff, Sydney C. Chapple, for something like one year; that he had been her attorney and confidential adviser, and had been paid to look after her estate, and had taken trips to Texas for the purpose of ascertaining the status of her estate, and that he had thus obtained knowledge of her said estate and affairs which was unknown to Sydney C. Chapple at the time of the execution of said instruments, and that the defendant, Samuel E. Gidney, failed to disclose what he
203 knew in relation to said estate, to the said Sydney C. Chapple, but withheld information which it was his duty to disclose.

III.

The court further finds that the plaintiff, Sydney C. Chapple, had spent but little time at the home of his mother for the last years of her life, and knew but little of the estate, and that he relied upon Gidney, who had been the attorney for his mother, and was the executor of what purported to be her will, and that he believed what Gidney told him, and acted upon Gidney's representations.

IV.

The court finds that taking into consideration the value of said estate, which is worth from $10,000.00 to $15,000.00, that the consideration of $510.00 was totally inadequate when considered in connection with the facts and circumstances under which said instruments were procured.

V.

The court further finds that the will executed by Sarah Rawlings on the 23rd day of October, 1905, in which she virtually disinherited her son, Sydney C. Chapple, and left her estate to the defendant, Samuel E. Gidney, is void for the reason that the said Sarah Rawlings did not have sufficient testamentary capacity at the time of executing the same to make a fair and intelligent disposition of her estate.

VI.

The court further finds that the defendant, Gidney, is entitled to a return of the consideration paid by him to the said Sydney C. Chapple for the execution of said instruments, and that the said Sydney C. Chapple shall return the same to him upon the execution by the said Gidney of a good and sufficient conveyance reconveying to him all of the property included in said instrument.

VII.

The Court further finds that the plaintiff, J. C. Scully, is
204 the owner of an undivided one-half interest in the estate of the said Sarah Rawlings, deceased, by virtue of a conveyance

executed to him by his co-plaintiff, Sydney C. Chapple, on the 3rd day of August, 1906.

VIII.

It is therefore considered, ordered, adjudged and decreed by the court that the conveyance and release from Sydney C. Chapple to the defendant, Samuel E. Gidney, made on the 22nd day of June, 1906, be and the same are hereby cancelled and set aside and held for naught.

It is further considered, ordered, adjudged and decreed by the court that the plaintiff, Sydney C. Chapple and J. C. Scully return to the defendant, Samuel E. Gidney, the sum of $510.00, together with interest thereon from the 22nd day of June, 1906, at the rate of 6 per cent per annum, being the consideration paid by the said Gidney for the conveyance and release herein cancelled and set aside, and that the said Samuel E. Gidney surrender up the said conveyance and release, and that he execute to the plaintiffs, Sydney C. Chapple and J. C. Scully, a reconveyance of all the property so conveyed to him.

It is further ordered, considered, adjudged and decreed by the court that the plaintiffs, Sydney C. Chapple, and J. C. Scully, deposit the diamond ring and ear bobs belonging to the estate of Sarah Rawlings with the clerk of this court to be held by him subject to the future order of this —.

It *if* further considered, ordered, adjudged and decreed by this court that the defendant, Samuel E. Gidney, pay all the costs of this proceeding, and that any part of the costs that have heretofore been paid by plaintiffs shall be deducted out of the said $510.00 which they are herein required to return to the said Samuel E. Gidney.

It is further ordered, considered, adjudged and decreed
205 by the court that the clerk in taxing the costs in this cause shall include the fee of the master in Chancery for his services, and the amount paid the said master for stenographer fees, and the witness fees of the witnesses who were before said master, and the fees for taking depositions of witnesses, and for all other costs in the proceedings.

And that execution issue for the collection of same.

To all of which findings and decree defendant excepts and prays an appeal to the Supreme Court, which pleas is by the court granted and the defendant is allowed sixty days to make and serve case-made, and plaintiff- *is* allowed ten days to suggest amendments and same to be settled upon five days' notice.

R. McMILLAN, *Judge.*

Plaintiffs' Exhibit "E."

Endorsed on the back thereof appears the following: No. 1173. Sydney C. Chapple, et al., Plaintiffs, vs. Samuel E. Gidney, et al., Defendants. Plaintiffs' Third Amended Complaint. State of Oklahoma, Muskogee County, ss. Filed April 21, 1911, Robert Toomer, Clerk Superior Court.

206 And thereafter, to wit, on the 24th day of April, 1911, comes the defendant, Samuel E. Gidney, by his attorneys, and files herein his demurrer to the third amended complaint of the plaintiffs, which said demurrer is in words and figures as follows, to wit:

In the Superior Court of Muskogee County, Oklahoma.

No. 1173.

SYDNEY C. CHAPPLE et al., Plaintiffs,
vs.
SAMUEL E. GIDNEY et al., Defendants.

Demurrer.

Comes now the defendant, Samuel E. Gidney, and files this, his demurrer to the third amended complaint of the plaintiffs, and for grounds therefor, states:

First. That said third amended complaint does not state facts sufficient to constitute an equitable cause of action.

Second. That the United States Court for the Western District of the Indian Territory, in which this suit was origionally instituted, could only try the issues involved in this case on its probate side, and did not have jurisdiction to try, and could not try, the issues involved in this complaint on the equity side of its docket, nor has this court to which it has been transferred.

HUTCHINGS & GERMAN,
GEO. A. MURPHY,
Attorneys for Defendant.

Endorsed on the back thereof omitting the caption appears the following: State of Oklahoma, Muskogee County. Filed April 24th, 1911. Robert Toomer, Clerk of Superior Court.

207 In the Superior Court in and for Muskogee County, Oklahoma.

On this Tuesday, April 25th, 1911, the Superior Court of Muskogee County, Oklahoma, met pursuant to adjournment. There were present Farrar L. McCain, Judge of said Court, presiding, Robert Toomer, Clerk, and W. E. Disney, County Attorney; and the following proceedings were had, to wit:

No. 1173. Law.

SIDNEY C. CHAPPLE and J. C. SCULLY, Plaintiffs.
vs.
SAMUEL E. GIDNEY, Defendant.

Journal Entry.

Now on this the 25th day of April, 1911, the same being one of the regular days of the regular March, 1911, Term of said Court, the above entitled matter coming on to be heard upon the demurrer of the defendant to the third amended complaint of the plaintiffs heretofor- filed herein, and the Court having heard the argument of counsel thereon and being well and sufficiently advised in the premises, doth*a* sustain the said demurrer of the defendant to the third amended complaint of the plaintiffs and the said plaintiffs refusing to plead further and electing to stand upon their third amended complaint, the Court doth dismiss this said action for want of equity, to all of which the plaintiffs except, and pray an appeal to the Supreme Court of the State of Oklahoma, which is granted and thirty days given them within to prepare and serve
Case Made on appe*la* herein and ten days thereafter given the
208 defendant within which to suggest amendments to the same
and ten days thereafter given the parties within which to have the said Case Made settled and signed as a part of the record in this cause.

FARRAR L. McCAIN, *Judge.*

209 Office of the Clerk of the Supreme Court, Oklahoma City, Oklahoma.

SYDNEY C. CHAPPLE et al., Plaintiff- in Error.
vs.
SAMUEL E. GIDNEY et al., Defendant- in Error.

I hereby certify that on the 3 day of June, 1911, there was filed in my office a petition in error and case made from transcript of the record of the #1123, Superior Court of Muskogee County, cash deposit of $10.00 and Waiver and Præcipe summons in error, in the above entitled cause; that said case was duly entered on the docket, numbered 2664, and is pending in the Supreme Court, and tnat summons in error was issued herein on the 5 day of June 1911 to Muskogee County.

Witness my hand and the seal of said Court, at Oklahoma City, this 6 day of June 1911.

[SEAL.]

W. H. L. CAMPBELL, *Clerk.*
By F. H. STURGEN, *Deputy.*

210 *Mandate.*

STATE OF OKLAHOMA, *ss*:

Supreme Court.

No. 2664.

SYDNEY C. CHAPPLE and J. C. SCULLY, Plaintiff- in Error,
vs.
SAMUEL E. GIDNEY et al., Defendants in Error.

The Supreme Court of Oklahoma to the Honorable Judge of the Superior Court of Muskogee County, in said State of Oklahoma:

Whereas, the Supreme Court of the State of Oklahoma, did at the June, 1913 Term thereof, on the 10" day of June, 1913, render an opinion in the above entitled cause, appealed from the Superior Court of Muskogee County, reversing the judgment of the lower court and remanding the cause thereto.

Now therefore, you are hereby commanded to cause this reversal to be shown of record in your court, and take such other and further proceedings herein as shall accord with said opinion and right and justice in the premises.

Supreme Court Costs $50.25.

Paid by Peff in error.

Witness, the Honorabel Samuel E. Hayes, Chief Justice of the Supreme Court of the State of Oklahoma, at the City of Oklahoma, this 30" day of September, 1913.

[SEAL.] W. H. L. CAMPBELL, *Clerk*.
By JESSIE PARDOE, *Deputy*.

211 In the Superior Court in and for Muskogee County, State of Oklahoma, Successor to the United States Court for the Western District of the Indian Territory, at Muskogee.

No. 1173.

SIDNEY C. CHAPPLE and J. C. SCULLY, Plaintiffs,
vs.
SAMUEL E. GIDNEY, CHARITY DOBBS, and SULLIVAN THORN,
Defendants.

Motion to Strike.

Comes now the defendant, Samuel E. Gidney, and moves the Court to strike from the third amended complaint so much thereof as is as follows:

Beginning on the top of page seven with the words, "Plaintiffs represent that tthe plaintiff-", etc., and continuing on pages seven,

eight, nine, ten, eleven and twelve and including the three top lines on page thirteen, and ending with the words, "to shock the conscience", same being irrelevant and immaterial to the issues in this case and constituting no part of the cause of action against this *plaintiff*.

Plaintiff also moves to strike from the complaint so much of the so-called supplemental complaint, beginning on page seventeen of said third amended complaint twelve lines from the bottom thereof and beginning with the words, "Your petitioners, by way of a supplemental complaint," and continuing with that part of page seventeen, together with pages eighteen and nineteen, inclusive, said page nineteen ending with the words "and the probate thereof by cancelled and set aside", the same being irrelevant and immaterial to the issues in this case and constituting no part of the cause of action against this defendant, Samuel E. Gidney.

WILLIAM T. HUTCHINGS,
Attorney for Defendant Samuel E. Gidney.

212 In the Superior Court of Muskogee County, Oklahoma.

No. 1173.

SIDNEY C. CHAPPLE et al., Plaintiffs,
vs.
SAMUEL E. GIDNEY et al., Defendants.

Demurrer.

Comes now the defendant, Samuel E. Gidney, and files this, his demurrer to the third amended complaint of the plaintiffs, and for grounds therefor, states:

First. That said third amended complaint does not state facts sufficient to constitute an equitable cause of action.

Second. That the United States Court for the Western District of the Indian Territory, in which this suit was originally instituted, could only try the issues involved in this case on its probate side, and did not have jurisdiction to try, and could not try, the issues involved in this complaint on the equity side of its docket, nor has this court to which it has been transferred.

HUTCHINGS & GERMAN,
GEO. A. MURPHY,
Attorneys for Defendant.

213 Be it remembered, that on this, the 8th day of December, 1913, the same being one of the regular judicial days of the November, 1913, term of the Superior Court of Muskogee County, Oklahoma, court having been opened in due form of law, present, the Honorable Farrar L. McCain, Judge, presiding; Robert Toomer, Clerk; J. F. Ledbetter, Sheriff; W. E. Disney, County Attorney, the following proceedings among others were had, to wit:

214 In the Superior Court in and for Muskogee County, State of Oklahoma.

No. 1173.

SYDNEY C. CHAPPLE and J. C. SCULLY, Plaintiffs,
vs.
SAMUEL E. GIDNEY, CHARITY DOBBS, and SULLIVAN THORN, Defendants.

This cause came on to be heard upon demurrer of S. E. Gidney, to the third amended complaint of the plaintiffs, which said demurrer the Court overruled, to which the defendant S. E. Gidney excepted and refused to plead further, and elected to stand upon his said demurrer, whereupon, judgment was rendered in favor of the plaintiffs. The Journal Entry of which is in words and figures as follows to wit:

215 In the Superior Court of Muskogee County, State of Oklahoma.

No. 1173.

SYDNEY C. CHAPPLE and J. C. SCULLY, Plaintiffs,
vs.
SAMUEL E. GIDNEY, CHARITY DOBBS and SULLIVAN THORN, Defendants.

Decree.

Now on this 8th day of December, 1913, this cause came on for hearing, and it appearing to the court from the mandate of the Supreme Court of the State of Oklahoma in this cause, heretofore spread of record in this Court, that the judgment of this Court in sustaining the demurrer of the defendant, Samuel E. Gidney, to the third amended complaint of the plaintiffs, was, by the Supreme Court, reversed and this cause remanded to this Court for further proceedings herein in accord with the opinion of said Court and right and justice in the premises, and the Court having examined said mandate and opinion and being now fully advised, doth, in accordance with said opinion and directions to this Court in the mandate, set aside its order heretofore made in this *cuase* sustaining said demurrer and now overrules said demurrer of the defendant, Samuel E. Gidney, to said third amended complaint, and enters its order of record to which overruling of said demurrer, defendant, Samuel E. Gidney, by his counsel, duly excepts.

And now again, on this day this cause being called for trial, the defendant, Samuel E. Gidney, through his counsel, says to
216 the Court that he does not desire to plead further but elects to stand on his demurrer and his exceptions to the Court's action in overruling the same.

And it further appearing to the Court that the defendant, Charity Dobbs, having been duly served with summons herein, has not filed her answer but has wholly made default, and that the defendant, Sullivan Thorn, having been duly served by publication, with citation herein, and having also entered his appearance in this cause while pending in the Supreme Court of Oklahoma, but having made no further appearance in this Court, nor having filed any answer therein, the Court finds that such defendants are in default, and the plaintiff, through their counsel, having announced ready for trial, and both plaintiffs and defendant, Samuel E. Gidney, in open Court waive the empanelling of a jury and agree that the issue of devisavit vel non should be framed and tried and determined by the Court, and the Court thereupon framed the issue in terms as follows:

Was the will purporting to have been executed by Mrs. Sarah Rawlings on the 23rd day of October, 1905, and the codicil thereto of April 13, 1906, heretofore offered for probate in the United States Court for the Western District of the Indian Territory at Muskogee on the 3rd day of July, 1906, the last will and testament of Sarah Rawlings, deceased, or not, and the Court having heard the evidence and being advised in the premises, finds the issues as follows: that the instruments above described and introduced in evidence were not the last will and testament of Sarah Rawlings, deceased.

And the Court further finds that at the time of the purported execution of the instruments described in the issue above framed, the said Sarah Rawlings lacked testamentary capacity to make a will and was induced to execute said instruments by the fraud and
217 undue influence of the defendant, Samuel E. Gidney.

The Court further finds that the issue of testamentary capacity on the part of Sarah Rawlings in executing the instruments aforesaid, was submitted and determined in the case of Sydney C. Chapple and J. C. Scully vs. Samuel E. Gidney, Charity Dobbs and Sullivan Thorn, the same being No. 7040 on the docket of the District Court of Muskogee County, Oklahoma, in which cause it was adjudged and determined that the said Sarah Rawlings lacked testamentary capacity at the time she executed the instruments above described, as shown by the decree in said cause, a copy of which is attached to the petition in this proceeding and marked Exhibit "—.

It is therefore considered, Ordered, adjudged and decreed by the Court that the purported will, executed on the 23rd day of October, 1905, and the codicil thereto of date of April 13th, 1906, is invalid, null and void and not the will of said Sarah Rawlings, and that the said Sarah Rawlings died intestate and that the said Samuel E. Gidney, who has entered his appearance herein, and the said Charity Dobbs and Sullivan Thorn, the other two defendants, who have made default herein take nothing by said purported will.

It is further ordered, adjudged and decreed that the probate of such purported will and codicil, heretofore had in the United States Court for the Western District of the Indian Territory, at Muskogee, be and the same is set aside, vacated and held for naught.

It is further ordered, adjudged and decreed that the defendant, Samuel E. Gidney, who has heretofore been acting as executor under

said pretended will, be and he is hereby ordered and required
218 to make full account for all that portion of said estate of Sarah Rawlings, which may have come into his hands from any source, whatever, and file the same in this Court within thirty days, subject to such other orders and directions as this Court may make in the premises.

It is further ordered, adjudged and decreed that the defendant, Samuel E. Gidney, pay all costs in this behalf incurred and let execution issue therefor, to all of which findings and judgment of the Court, the defendant, Samuel E. Gidney, by his counsel, duly excepts.

FARRAR L. McCAIN,
Judge of said Court.

On the back of said Journal Entry omitting the title of said cause appears the following: State of Oklahoma, Muskogee County. Filed December 8th, 1913, Robert Toomer, Clerk of the Superior Court.

[Endorsed:] No. 1173. Sydney C. Chappel et al. vs. Samuel E. Gidney et al. Decree. State of Oklahoma, County of Muskogee. Filed Dec. 11, 1913. Robert Toomer, Clerk of Superior Court.

219 And thereafter to wit: on the 10th day of December, 1913, comes the defendant, Samuel E. Gidney, by his attorney, and files herein his motion for a new trial, which said motion is in words and figures as follows to wit:

In the Superior Court in and for Muskogee County, State of Oklahoma.

No. 1173.

SYDNEY C. CHAPPLE and J. C. SCULLY, Plaintiffs,
vs.
SAMUEL E. GIDNEY, CHARITY DOBBS and SULLIVAN THORN, Defendants.

Motion for New Trial.

Comes now the defendant, Samuel E. Gidney, and moves the Court to vacate and set aside the decision and judgment rendered herein on the 8th day of December, 1913, and to grant a new trial for the following causes which affect materially the substantial rights of said defendant.

I.

That the decision of the Court is contrary to law.

II.

Error of the Court in over-ruling the demurrer of the defendant to the plaintiff's third amended petition.

III.

In entering judgment against the defendant, setting aside the will.

220 IV.

In finding that the question of testamentary capacity of Mrs. Sarah Rawlings at the time she executed the deed was passed upon in the case of Chapple and Scully vs. Gidney, et al., in No. 7040 from the docket of the District Court of Muskogee County, and that the finding of the Supreme Court on that subject in that case was res judicata in this case.

WM. T. HUTCHINGS,
Attorney for Defendant Samuel E. Gidney.

Endorsed on the back thereof omitting caption appears the following: State of Okalahoma, County of Muskogee. Filed December 10th, 1914, Robert Toomer, Clerk of the Superior Court.

221 That thereafter, to wit: On the 11th day of December, 1913, said defendant's motion for a new trial came on for hearing and the same being heard and after the arguments of counsel thereon, the Court being fully advised in the premises, and said defendant's motion for new trial — to which ruling said defendant then and there excepted and asked for time in which to prepare and serve the case-made for appeal to the Supreme Court, and the fixing of a supersedeas bond. The Journal Entry overruling said motion and the exception *to* the defendant thereto, and granting time for serving case-made and filing supersedas bond, *as* in words and figures as follows to wit:

222 In the Superior Court in and for Muskogee County, State of Oklahoma.

No. 1173.

SYDNEY C. CHAPPLE and J. C. SCULLY, Plaintiffs,
vs.
SAMUEL E. GIDNEY, CHARITY DOBBS, and SULLIVAN THORN,
Defendants.

Order Overruling Motion for New Trial.

This cause came on the 11th day of December, 1913, for hearing of the motion for a new trial heretofore filed in said case by Samuel E. Gidney, and, the Court having duly considered the same, doth over-rule it. To the over-ruling of which said motion, the defendant, Samuel E. Gidney, excepted at the time.

On said day it was further ordered that the defendant, Samuel E. Gidney, have sixty days for the preparing and serving of a case made in the above entitled cause, and that the plaintiffs have ten

days thereafter within which to suggest amendments, and that said case-made be settled upon five days' notice by either party.

It is further ordered that the defendant, Samuel E. Gidney, have fifteen days within which to file a supersedeas bond of $5,000.00 in this case.

And, it further appearing, on this, the 24th day of December, 1913, that the defendant, Samuel E. Gidney, should have more time within which to make and file said supersedeas bond, said time is extended an additional ten days from this date.

Done this the 24th day of December, 1913.

FARRAR L. McCAIN,
Judge of Superior Court.

223 That thereafter to wit: on the 5th day of January, 1914, said defendant files his supersedeas bond in said cause, and the same was duly approved, the said supersedeas bond together with the approval thereof is in words and figures as follows to wit:

In the Superior Court in and for Muskogee County, State of Oklahoma.

No. 1173.

SYDNEY C. CHAPPLE and J. C. SCULLY, Plaintiffs,
vs.
SAMUEL E. GIDNEY, CHARITY DOBBS, and SULLIVAN THORN, Defendants.

Supersedeas Bond.

Know all men by these presents: That, We, Samuel E. Gidney, as Principal, and the Southern Surety Company, a corporation, as surety, all of the County of Muskogee, State of Oklahoma, are held and firmly bound unto Sydney C. Chapple and J. C. Scully in the sum of Five Thousand Dollars, lawful money of the United States, to be paid to the said Sydney C. Chapple and J. C. Scully and their heirs, executors, administrators, assigns, for the payment of which, well and truly to be made, we bind ourselves, jointly and severally by these presents.

Sealed with our seals and dated this 3rd day of January, 1914.

The condition of the foregoing obligation is such that,

Whereas, the above bounded Samuel E. Gidney, has appealed from the judgment of the Superior Court in and for Muskogee County, State of Oklahoma, rendered on the 8th day of December, 1913, and the further judgment of said court over-ruling the motion for new trial of said cause in an action then pending in

224 said Court, wherein the said Sydney C. Chapple and J. C. Scully were plaintiffs, and the said Samuel E. Gidney and Sullivan Thorn and Charity Dobbs were defendants, in which judgment the Court found that the purported will of Mrs. Sarah Rawlings, executed on the 23rd day of October, 1905, and the pur-

ported codicil thereto, executed on the 13th day of April, 1906, was not the last will of the said Sarah Rawlings, and that the probate on the said purported will and codicil heretofore had in the United States Court for the Western District of the Indian Territory, at Muskogee, on the 3rd day of July, 1906, be vacated, set aside and held for naught and that the defendant, Samuel E. Gidney, make full account of all that portion of said estate of Sarah Rawlings, deceased, which may have come into his hands from any source, whatever, and file the same in this Court within thirty days from this date, subject to such other orders and directions as this Court may make in the premises and that he pay all costs in this behalf incurred for which execution should issue.

Now, therefore, if the appellant, Samuel E. Gidney, shall pay to the appellees, Sydney C. Chapple and J. C. Scully, all costs and damages that shall be adiudged against the appellant on the appeal, and will satisfy and perform the judgment or order appealed from in case it should be affirmed or dismissed, with all rents and profits arising from said estate during the pendency of the appeal, of which the appellees, Sydney C. Chapple and J. C. Scully, are kept out of possession by reason of such appeal, then this obligation shall be void; otherwise to remain in full force and virtue.

SAMUEL E. GIDNEY, *Principal*,
SOUTHERN SURETY COMPANY,
A Corporation, Surety,
By O. A. WELLS,
Vice-President.

225 Omitting caption the said bond contains the following endorsement to wit: State of Oklahoma, County of Muskogee. Filed January 5th, 1914, Robert Toomer, Clerk of the Superior Court. Approved this the 5th day of January, 1914, Robert Toomer, Clerk.

That, thereafter to wit: on the 6th day of February, 1914, upon application of defendant the Court made an order extending time for serving case-made herein to and including the 10th day of March, 1914, which order is in words and figures as follows to wit:

In the Superior Court in and for Muskogee County, State of Oklahoma.

No. 1173.

SYDNEY C. CHAPPLE and J. C. SCULLY, Plaintiffs,
vs.
SAMUEL E. GIDNEY, CHARITY DOBBS, and SULLIVAN THORN, Defendants.

Order Extending Time for Preparing and Serving Case-made.

Now, on this 6th day of February, 1914, for good cause shown, the time for preparing and serving the case made in the above en-

titled and numbered cause is extended to and including the 10th day of March, 1914, the plaintiffs to have ten days thereafter within which to suggest amendments thereto, the case to be signed and settled upon five days' notice by either party.

FARRAR L. McCAIN, *Judge.*

226 That thereafter to wit; on the 10th day of March 1914, upon application of defendant, the Court made an order extending time for serving case-made herein to and including the 25th day of March, 1914, and designated time in which to file the same in the Supreme Court, and staying execution on the judgment herein, which order is in words and figures as follows, to wit:

In the Superior Court in and for Muskogee County, State of Oklahoma.

No. 1173.

SYDNEY C. CHAPPLE and J. C. SCULLY, Plaintiffs,
vs.
SAMUEL E. GIDNEY, CHARITY DOBBS, and SULLIVAN THORN, Defendants.

Order Extending Time for Preparing and Serving Case-made.

Now, on this 10th day of March, 1914, for good cause shown, the time for preparing and serving the case made in the above entitled and numbered cause is extended to and including the 25th day of March, 1914, the plaintiffs to have ten days thereafter within which to suggest amendments thereto, the case to be signed and settled upon five days' notice by either party. And the defendant shall have sixty days from and after this date within which to file his case made in the Supreme Court, and execution on the judgment heretofore rendered is superseded and stayed until that date.

FARRAR L. McCAIN, *Judge.*

227 Omitting the caption said order contains the following endorsements: State of Oklahoma, County of Muskogee, ss. Filed March 10th, 1914. Robert Toomer, Clerk.

228 That thereafter to wit: on the 25th day of March, 1914, upon application of the defendant, Samuel E. Gidney, the Court made an order extending the time for serving case-made herein to and including the 1st day of May, 1914, and designated the time in which to file the same in the Supreme Court, and staying execution on the judgment herein, which order is in words and figures as follows, to wit:

In the Superior Court in and for Muskogee County, State of Oklahoma.

No. 1173.

SYDNEY C. CHAPPLE and J. C. SCULLY, Plaintiffs,
vs.
SAMUEL E. GIDNEY, CHARITY DOBBS, and SULLIVAN THORN, Defendants.

Order Extending Time for Preparing and Serving Case-made.

Now, on this 25th day of March, 1914, for good cause shown, and particularly for the purpose of locating and serving the case made upon the defendants, Charity Dobbs and Sullivan Thorn, the time for preparing and serving said case made is extended to and including the 1st day of May, 1914, the plaintiffs to have ten days thereafter within which to suggest amendments thereto, the case to be signed and settled upon five days' notice by either party. And it is further ordered that the defendant, Samuel E. Gidney, have thirty days from and after the signing and settlement of said case made within which time to file his petition in error and case made in the Supreme Court, and execution on the judgment heretofore rendered is supreseaded and stayed until that date.

FARRAR L. McCAIN, *Judge.*

Omitting the caption said order contains the following endorsement: State of Oklahoma, County of Muskogee. Filed March 25th 1914. Robert Toomer, Clerk.

229 In the Superior Court in and for Muskogee County, State of Oklahoma.

No. 1173.

SYDNEY C. CHAPPLE and J. C. SCULLY, Plaintiffs,
vs.
SAMUEL E. GIDNEY, CHARITY DOBBS, and SULLIVAN THORN, Defendants.

Motion for Revivor.

Comes now Samuel E. Gidney, one of the co-defendants herein, and suggests to the Court, that Sullivan Thorn, one of the co-defendants herein, departed this life in Gordon County, Georgia on the 5th day of March, 1913, and that B. F. Silks has been duly appointed executor of the Will and Estate of said Sullivan Thorn, deceased, and has duly qualified as such; that the death of said Sullivan Thorn was not known to the said Samuel E. Gidney or to any of the parties

to this action until this week; and the said Samuel E. Gidney now moves the Court to order that this action or judgment entitled as above be revived in the name of B. F. Silks, executor of the estate and Will of Sullivan Thorn, deceased.

WILLIAM T. HUTCHINGS,
His Attorney.

230 In the Superior Court in and for Muskogee County, State of Oklahoma.

No. 1173.

SYDNEY C. CHAPPLE and J. C. SCULLY, Plaintiffs,
vs.
SAMUEL E. GIDNEY, CHARITY DOBBS, and SULLIVAN THORN, Defendants.

Notice for Application of Revivor.

B. F. Silks as executor of the Will and Estate of Sullivan Thorn, deceased, co-defendant herein, and Charity Dobbs, co-defendant herein, will take notice that co-defendant, Sullivan Thorn having died on March 5th, 1913, and B. F. Silks having been duly appointed his executor, the said Samuel E. Gidney, a defendant herein will on the 1st day of June, 1914, in the Superior Court in and for said County and State, apply to said Court, and move said Court to order the action or judgment entitled as above be revived in the name of B. F. Silks, executor of the Will and Estate of Sullivan Thorn, deceased; When and where you are notified to appear and show cause why the same should not be so revived.

SAMUEL E. GIDNEY,
By WILLIAM T. HUTCHINGS,
His Attorney.

231 In the Superior Court in and for Muskogee County, State of Oklahoma.

No. 1173.

SYDNEY C. CHAPPLE and J. C. SCULLY, Plaintiffs,
vs.
SAMUEL E. GIDNEY, CHARITY DOBBS, and SULLIVAN THORN, Defendants.

Affidavit to Obtain Service by Publication.

Samuel E. Gidney of lawful age being first duly sworn says, that he is one of the co-defendants above named, and that on the 7th day of May, 1914, he filed in the above entitled cause Motion of Revivor,

setting out that Sullivan Thorn, one of the defendants herein, died in Gordon County, Georgia, and that B. F. Silks is the duly appointed and qualified executor of the Will and Estate of said Sullivan Thorn, deceased, and asking that the cause or judgment herein be revived in the name of such executor.

Affiant further states that B. F. Silks, executor as aforesaid, and Charity Dobbs are non-residents of the State of Oklahoma, and that service of summons or notice can not be made on them or either of them with due diligence within the said State of Oklahoma; that the said B. F. Silks lives in Gordon County, Georgia and the said Charity Dobbs in Fort Smith, Arkansas; and that the said Samuel E. Gidney, a defendant herein,—wishes to obtain service on them and each of them by publication.

SAMUEL E. GIDNEY.

Subscribed and sworn to before me this 7th day of May, 1914.

IVO MILLER,
Notary Public.

My commission expires Feb. 12th, 1916.

232 In the Superior Court in and for Muskogee County, State of Oklahoma.

No. 1173.

SYDNEY C. CHAPPLE and J. C. SCULLY, Plaintiffs,
vs.
SAMUEL E. GIDNEY and CHARITY DOBBS and SULLIVAN THORN, Defendants.

Notice of Application for Revivor.

Sydney C. Chapple and J. C. Scully, will take notice that Sullivan Thorn, one of the defendants herein, having died on March 5th, 1913, and B. F. Silks having been appointed as executor, and the sale heirs, devisees and next of kin of said Sullivan Thorn, being Banie Fincher and Lillie Thorn, the said Samuel E. Gidney, defendant herein, will on the 1st day of June, 1914, in the Superior Court in and for said County and State apply to said Court to move the same to order the action or judgment entitled as above to be revived in the name of B. F. Silks, executor of Sullivan Thorn, deceased, and Banie Fincher and Lillie Thorn, when and where you are notified to appear and show cause why the same should not be so revived.

SAMUEL E. GIDNEY.

WILLIAM T. HUTCHINGS, *Attorney.*

232½ STATE OF OKLAHOMA,
Muskogee County, ss:

I received this writ 20th day of May, 1914, and served Sidney C. Chappel, by personally delivering to him a true copy of the within notice, May 20th, 1914.

J. F. LEDBETTER, *Sheriff,*
By D. W. JACKSON, *Dep't*

Sheriff's Fees ..... .50¢
Service and return.... .25

1 Copy. Total..... .75

State of Oklahoma, Muskogee County, ss: Filed May 25, 1914. Robert Toomer, Clerk of Superior Court.

233 In the Superior Court in and for Muskogee County, State of Oklahoma.

No. 1173.

SYDNEY C. CHAPPLE and J. C. SCULLY, Plaintiffs,
vs.
SAMUEL E. GIDNEY and CHARITY DOBBS and SULLIVAN THORN,
Defendants.

Notice of Application for Revivor.

Sydney C. Chapple and J. C. Scully, will take notice that Sullivan Thorn, one of the defendants herein, having died on March 5th, 1913, and B. F. Silks having been appointed as executor, and the sole heirs, devisees and next of kin of said Sullivan Thorn, being Banie Fincher and Lillie Thorn, the said Samuel E. Gidney, defendant herein, will on the 1st day of June, 1914, in the Superior Court in and for said County and State, apply to said Court to move the same to order the action or judgment, entitled as above to be revived in the name of B. F. Silks, executor of Sullivan Thorn, deceased, and Banie Fincher and Lillie Thorn, when and where your are notified to appear and snow cause why the same should not be so revived.

SAMUEL E. GIDNEY.

WILLIAM T. HUTCHINGS, *Attorney.*

STATE OF OKLAHOMA,
County of Muskogee, ss:

I hereby certify that I have on this the 21st day of May, 1914, duly *excepted* the within notice by delivering a copy of the same to J. C. Scully in the town of Haskell, Okla.

J. F. LEDBETTER, *Sheriff.*

Fees for Service..... .50¢
Copy..... .25

Total..... .75

234 *Proof of Publication.*

In County Court.

STATE OF OKLAHOMA,
County of Muskogee, ss:

Valley L. Nelson being duly sworn, deposes and says that she is the Accountant of the Muskogee County, Democrat, a weekly newspaper printed and published at Muskogee, in said County, having general circulation in said Town and County and having been continuously and uninterruptedly published in said County for the period of fifty-two (52) consecutive weeks prior to the first publication of the notice herein.

That a notice, of which the annexed is a true copy, was published in said newspaper, once each week, for Three consecutive weeks, the first publication of said notice in said newspaper being in the issue thereof bearing the date of the 7 day of May 1914, and the last publication of said notice in said newspaper being in the issue thereof bearing date of the 21 day of May 1914.

VALLEY L. NELSON.

Subscribed and sworn to before me by Valley L. Nelson, the Accountant of the Muskogee County Democrat, in the town of Muskogee, Oklahoma, this 21 day of May, 1914.

[SEAL.] ROSE WOLFE,
Notary Public.

My commission expires January 19, 1918.

State of Oklahoma, County of Muskogee, ss. Filed June 2, 1914. Robert Toomer, Clerk Superior Court.

(Published in Muskogee County Democrat May 7, 14 and 21, 1914.)

In the Superior Court in and for Muskogee County, State of Oklahoma.

No. 1173.

SYDNEY C. CHAPPLE and J. C. SCULLY, Plaintiffs,
vs.
SAMUEL E. GIDNEY, CHARITY DOBBS, and SULLIVAN THORN, Defendants.

Notice for Application of Revivor.

B. F. Silks as executor of the will and estate of Sullivan Thorn, deceased, co-defendant herein, and Charity Dobbs, co-defendant herein, will take notice that co-Defendant Sullivan Thorn, having died on March 5th, 1913, and B. F. Silks having been duly appointed

his exectuor, the said Samuel E. Gidney, a defendant herein, will on the 1st day of June, 1914, in the Superior court in and for said county and state, apply to said court and move said court to order the action or judgment entitled as above be revived in the name of B. F. Silks, executor of the will and estate of Sullivan Thorn, deceased: When and where you are notified to appear and show cause why the same should not be so revived.

SAMUEL E. GIDNEY,
By WILLIAM L. HUTCHINGS,
His Attorney.

235 In the Superior Court in and for Muskogee County, State of Oklahoma.

No. 1173.

SYDNEY C. CHAPPLE et al., Plaintiffs,
vs.
SAMUEL E. GIDNEY et al., Defendants.

Order Reviving Said Action Against the Executor of Sullivan Thorn.

This cause came on this the 2nd day of June, 1914, upon the motion of Samuel E. Gidney, one of the co-defendants in the above entitled action to revive said action in the name of B. F. Silks, the duly appointed executor of the last will and estate of Sullivan Thorn, deceased, who departed this life on March 5, 1913, Notice of said hearing having been duly and personally served upon Sydney C. Chapple and J. C. Scully, and notice by publication as to B. F. Silks, executor, and Charity Dobbs having been made as prescribed by law, and proof of same being exhibited to the Court, said notice having placed the date of said hearing upon the 1st day of June, 1914, and the Court having continued all hearings set for June 1, 1914, to June 2, 1914, And the said cause then coming on for hearing on said June 2, 1914, and the foregoing facts being made fully to appear to the Court on said date.

It is, therefore, ordered, adjudged and decreed that this action or judgment entitled as above be and the same is hereby revived as to the said Sullivan Thorn in the name of B. F. Silks, executor of the estate and will of said Sullivan Thorn, deceased.

FARRAR L. McCAIN, *Judge.*

236 STATE OF OKLAHOMA,
County of Muskogee, ss:

I, Robert Toomer, Clerk of the Superior Court for said county, do hereby certify that the foregoing is a full, true, and correct transcript of the record in the above entitled cause.

In witness whereof, I have hereunto set my hand and seal of the court, this 6th day of June, 1914.

ROBERT TOOMER, *Clerk,*
ROBERT TOOMER, Clerk.
[SEAL.] By WARREN BUTZ, *Deputy.*

237 *Proof of Publication.*

#6501.

In Supreme Court.

SAMUEL E. GIDNEY, Plaintiff in Error,
vs.
SYDNEY C. CHAPPLE et al., Defendants in Error.

STATE OF OKLAHOMA,
County of Muskogee, ss:

Hope Tabor being duly sworn, deposes and says that he is the Accountant of the Muskogee County Democrat, a weekly newspaper printed and published at Muskogee, in said County, having general circulation in said Town and County and having been continuously and uninterruptedly published in said County for the period of fifty-two (52) consecutive weeks prior to the first publication of the notice herein.

That a notice, of which the annexed is a true copy, was published in said newspaper, once each week, for 4 consecutive weeks, the first publication of said notice in said newspaper being in the issue thereof bearing the date of the 9th day of July 1914, and the last publication of said notice in said newspaper being in the issue thereof bearing date of the 30th day of July 1914.

HOPE TABOR.

Subscribed and sworn to before me by Hope Tabor, the Accountant of the Muskogee County Democrat, in the town of Muskogee, Oklahoma, this 3rd day of August 1914.

[SEAL.] ROSA L. WOLFE,
Notary Public.

My commission expires January 19, 1918.

(Published in Muskogee County Democrat July 9, 16, 23, and 30, 1914.)

In the Supreme Court of the State of Oklahoma.

No. 6501.

SAMUEL E. GIDNEY, Plaintiff in Error,
vs.
SYDNEY C. CHAPPLE, J. C. SCULLY, CHARITY DOBBS, and B. F. Silks, Executor of the Estate of Sullivan Thorn, Deceased, Defendants in Error.

Notice by Publication.

To Charity Dobbs and B. F. Silks, executor of the Estate of Sullivan Thorn, Deceased, Defendants in Error:

You are hereby notified that the Plaintiff in Error, Samuel E. Gidney, has appealed from the judgment rendered by the Superior

Court of Muskogee County in the action whereinSydney C. Chapple and J. C. Scully, Defendants in Error, were plaintiffs, and Samuel E. Gidney, Plaintiff in Error, was defendant, and wherein judgment was rendered against the Plaintiff in Error, and that the said cause is now pending in this Court on error, under the above styled and numbered cause; that the Plaintiff in error seeks by said proceeding in error, to reverse and vacate said judgment of said Superior Court, and have judgment against the defendants in error for costs.

Witness my hand and the seal of said Court, this the 2nd day of July, 1914.

W. H. L. CAMPBELL,
Clerk of the Supreme Court,
[SEAL.] By T. H. STURGEON, *Deputy.*

[Endorsed:] No. 6501. Samuel E. Gidney, Plaintiff in Error, vs. Sydney C. Chapple et al., Defendant- in Error. Proof of Publication. Filed Aug. 6, 1914. W. H. L. Campbell, Clerk.

238 And thereafter, towit, on August 11th, 1914, the following order is made.

No. 6501.

SAMUEL E. GIDNEY, Plaintiff in Error,
vs.
SYDNEY C. CHAPPLE et al., Defendant- in Error.

And now, this cause comes on for final decision and determination, by the court, upon the record and briefs filed herein and the court having considered the same finds that the judgment of the court below in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the court below in the above cause be and the same is hereby affirmed.

Opinion by Kane, C. J.

239 Filed Aug. 11, 1914. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 6501.

SAMUEL E. GIDNEY, Plaintiff in Error,
vs.
SIDNEY C. CHAPPLE et al., Defendants in Error.

1. A question decided by the Supreme Court on a former appeal becomes the law of the case in all its stages, and will not ordinarily be reversed upon a second appeal of the same case when the facts are substantially the same.

2. If, upon a cause being remanded, the court below has proceeded in substantial conformity with the directions of the appellate court, its action will not be questioned on a second appeal.

(Syllabus by the Court.)

Error from the Superior Court of Muskogee County.

Hon. Farrar L. McCain, Judge.

Affirmed.

Wm. T. Hutchings, for Plaintiff in Error.

Yancey Lewis, N. B. Maxey, Chas. F. Runyan, for Defendant- in Error.

Opinion of the Court by

KANE, *C. J.*:

This cause comes on to be heard upon a motion to dismiss the appeal filed by the defendant- in error. Counsel for Plaintiff in error admits that said cause was brought to this Court by a certified transcript and that the error complained of is in overruling the demurrer of the plaintiff in error to the third amended petition in this case in rendering judgment against the plaintiff in error. That this cause was passed upon by this Court when the said case was before it on another appeal and that this Court has nothing to do, if it adheres to its former ruling but affirm the judgment of the court below. (Gidney v. Chapple et al., 26 Okla., 737;
240 Same v. Same, 38 Okla. 596.) It has often been held by this Court that a question decided by the Supreme Court on a former appeal becomes the law of the case in all its stages, and will not ordinarily be reversed upon a second appeal of the same case when the facts are substantially the same.

An examination of the record discloses that upon said cause being reversed and remanded, the trial court proceeded in substantial conformity with the directions of the Supreme Court. The authorities are to the effect that if, upon a cause being remanded, the court below has proceeded in substantial conformity with the directions of the appellate court, its action will not be questioned on a second appeal. Oklahoma City Elec. Gas. & Power Co. v. Baumhoff, 21 Okla. 503; C. R. I. & P. Ry. Co. v. Broe, 23 Okla. 396; First Nat. Bank v. Keys, 27 Okla. 704; Harper v. Kelly, 29 Okla. 809.

The judgment of the court below is therefore affirmed.

All the Justices concur.

241 And thereafter, towit, on August 25th, 1914, the following order is made.

No. 6501.

SAMUEL E. GIDNEY, Plaintiff in Error,
vs.
SYDNEY C. CHAPPLE et al., Defendants in Error.

And now, on this day, it is ordered by the Court that the motion herein to dismiss the above appeal be, and the same is hereby overruled.

242 I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, hereby certify that the foregoing pages numbered from 1 to 241, both inclusive are a full, true and complete transcript of the record and all proceedings in said Court in the case entitled Samuel E. Gidney, Plaintiff in Error, vs. Sydney C. Chapple, et al., Defendants in Error, as the same remain on file and of record in this Court.

In Witness Whereof, I hereunto set my hand and the seal of the Supreme Court this 10th day of October, 1914.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL, *Clerk*,
By JESSIE PARDOE, *Deputy*.

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No. 355.

In the

Supreme Court of the United States.

October Term, 1918.

SAMUEL E. GIDNEY, - - - *Plaintiff in Error,*

vs.

SYDNEY C. CHAPPLE and J. C. SCULLY, et al.,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF OF PLAINTIFF IN ERROR.

WILLIAM T. HUTCHINGS,
Attorney for Samuel E. Gidney.

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In the

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vs.

SYDNEY C. CHAPPLE and J. C. SCULLY, *et al.*,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

Statement.

This suit was instituted on the 18th day of August, 1906, in the United States Court for the Western Judicial District of the Indian Territory at Muskogee, and the complaint was properly entitled "Complaint in Equity to Set Aside a Will." The suit was instituted by Sydney C. Chapple against

Samuel E. Gidney, Charity Dobbs and Sullivan Thorn. (Rec., p. 15.) It was not tried upon this complaint, and this is merely set out to show under what section of the Arkansas Law claimed to be adopted and put in force in the Indian Territory by Congress the suit was brought.

Subsequently a motion was made to have J. C. Scully made a party plaintiff on the ground that he owned an interest in whatever Sydney C. Chapple claimed to own in this controversy (Rec., p. 27). This motion was sustained, and by an amendment to the complaint J. C. Scully was made party plaintiff. (Rec., pp. 30 and 31.) Thereafter an amended complaint in full was filed by the plaintiffs (Rec., p. 33).

Under the law when the State of Oklahoma was erected out of the Indian Territory and the Territory of Oklahoma, this case was transferred to the District Court in and for Muskogee County. Afterwards the Legislature of Oklahoma created for Muskogee County a Superior Court, the jurisdiction of which will be hereafter shown, and provided for the transfer of cases from the District Court to the Superior Court. On motion of the plaintiffs, on the 19th day of December, 1910, this case was ordered transferred to the Superior Court of Muskogee County (Rec., p. 64), and on February 24, 1911, the defendant Samuel E. Gidney by leave of the court withdrew his answer to the amended complaint of the plaintiff and filed a demurrer thereto (Rec., p.

65), which was duly sustained. The plaintiff then filed a second amended complaint. (Rec., p. 66.) To this the court also sustained a demurrer (Rec., p. 91), and on the 21st day of April, 1911, a third amended complaint was filed (Rec., p. 91.) A demurrer was filed by the defendant Gidney to this petition on the 24th day of April, 1911 (Rec., p. 123). The court sustained this demurrer also (Rec., p. 124) and the case was appealed by the plaintiffs to the Supreme Court of the State of Oklahoma, and the decision of the lower court reversed. Mandate on this reversal was handed down and spread of record (Rec., p. 125). The case was re-heard on the same demurrer to the third amended complaint (Rec., p. 127) and on the 8th day of December, 1913, the lower court in obedience to the decision and mandate of the Supreme Court overruled the demurrer of Samuel E. Gidney. He declined to plead further, and final judgment was rendered against him (Rec., p. 127).

The third amended complaint, upon which this suit was tried, set up the fact that Sydney C. Chapple was the son and sole heir at law of Sarah Rawlings, who departed this life on the 16th of June, 1906, at Haskell, then in the Western District of the Indian Territory. That she died intestate, possessed of considerable property which is specifically set out in the complaint. It is alleged that the defendant Samuel E. Gidney wrongfully procured the said Sarah Rawlings to execute a writing purporting to

be her last will, and procured the same to be admitted to probate. That the said Chapple being poor and unable to secure the money to prosecute an action to set aside said will entered into a contract with J. C. Scully on the third day of August, 1906, whereby the said Scully agreed to employ counsel and advance the necessary money to prosecute a suit or suits to set aside said will and other conveyances made by Chapple himself to the defendant Gidney. Various reasons were set forth in the complaint which it was alleged rendered Sarah Rawlings wholly incapable of making a valid will, but they do not affect the decision in this case.

It is alleged that on the 3rd day of July, 1906, the instrument purporting to be the last will and testament of Sarah Rawlings was exhibited in the United States Court for the Western District of the Indian Territory, and that the same was then and there probated in common form, and letters testamentary were issued to Samuel E. Gidney, the person named in said will to act as executor of said will, and the said Gidney then and there qualified and took upon himself the burden of executor of the will of the said Sarah Rawlings, deceased.

It is alleged that the said Gidney procured the probate of said will in common form in furtherance of a scheme to acquire the property of Mrs. Rawlings and to defraud the plaintiff of the same. That he did so without notice to the plaintiff, Chapple, or

the interested parties of such purpose to probate said will. It is alleged that at the time said will was probated plaintiff Chapple resided out of that portion of Oklahoma which at that time was the Indian Territory, although in the original complaint (Rec., p. 15) the following allegation is made: "Your petitioner, Sydney C. Chapple, respectfully represents unto your honor that he is a citizen of the United States and a resident of the Western District of the Indian Territory." The original complaint herein was filed on the 18th day of August, 1906.

It was further prayed that in case the court found that plaintiffs could not maintain the action to set aside the will and cancel its probate on the ground that the plaintiff Chapple was a non-resident and was not personally served with process, and did not appear, that the proceeding might be treated as an appeal from the probate of the will by the United States Court for the Western District of the Indian Territory, and that the cause be tried as upon appeal, and that the issue of *devisavit vel non* be heard as on appeal, and further, in case the proceeding should not be treated as an appeal from the probate of said will, and in case the court should find that the plaintiff could not maintain the action to set aside the will and to cancel its probate, they ask that the Superior Court of Muskogee County, Oklahoma, as a successor of the United States Court should direct that the issue of the validity of said will be tried.

There is further plead a judgment in another case brought in the United States Court for the Western District of the Indian Territory, to set aside certain instruments executed by Sydney C. Chapple to Samuel E. Gidney, and it is alleged that the judgment of the court in that case was *res adjudicata* on the question of the validity of the will. The amended complaint in that case is attached to the third amended complaint upon which this case was tried. (Rec., p. 107.) Also the answer of the defendant to said amended complaint (Rec., p. 114) and the decree of the lower court in said case (Rec., p. 120) which was affirmed by the Supreme Court of the state, which case will be noticed in our argument of the questions of law involved.

The lower court after overruling the demurrer to the third amended complaint (Rec., p. 128) found that the instrument introduced in evidence as the last will and testament of Sarah Rawlings was not her last will and testament, that she lacked testamentary capacity to make a will at the time the same was made. The court further found that the issue of testamentary capacity on the part of Sarah Rawlings in executing said will was submitted and determined in the case of *Sydney C. Chapple and J. C. Scully* v. *Samuel E. Gidney et al.*, same being No. 7040 on the docket of the District Court of Muskogee County, State of Oklahoma, and that said question was *res adjudicata*. The defendant Gidney then

filed his motion for a new trial under the state practice (Rec., p. 129) which was duly overruled (Rec., p. 130). This case was then appealed to the Supreme Court of this state and the judgment of the lower court affirmed in an opinion by Chief Justice KANE (Rec., p. 142). From the decision of the Supreme Court of the State of Oklahoma the case was brought here by a writ of error and the grounds urged for reversal of said decision will be hereafter urged.

ASSIGNMENTS *of* ERROR.

The plaintiff in error submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Oklahoma in the above entitled matter there is manifest error in this, to-wit:

First. In holding that either section 6523 of chapter 155, Mansfield's Digest of Arkansas, or section 6525 of the same chapter was available to the original plaintiffs in this action, and that they were put in force in the Indian Territory by the Act of May 2, 1890 (26 Stat. L. 81), and were embraced within the body of laws extended over and put in force in the Indian Territory, by which said holding the plaintiff in error is deprived of property without due process of law, and his rights, privileges and

immunities secured to him by the laws of the United States.

Second. The court erred in holding that section 6509 of Mansfield's Digest of the Laws of Arkansas of 1884 was locally inapplicable and was not extended over and put in force in the Indian Territory by the Act of Congress of May the 2nd, 1890.

Third. The court further erred in holding that the United States Court for the Western District of the Indian Territory had jurisdiction under section 6523 of Mansfield's Digest of the State of Arkansas, to try said cause, which said section is as follows:

> "Any person interested who, at the time of the final decision in the Circuit Court, resided out of this state, and was proceeded against by order of appearance only, without actual appearance or being personally served with process, may, within three years after such final decision in the Circuit Court, by a bill of chancery, impeach the decision and have a retrial of the question of probate; and either party shall be entitled to a jury for the trial thereof. An infant, not a party, shall not be barred of such proceedings in chancery until twelve months after attaining full age."

Fourth. The court further erred in holding that said United States Court for the Western District of the Indian Territory had jurisdiction to try this cause under section 6525 of Mansfield's Digest of Arkansas, under the Act of Congress of May 2,

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Fourth. The court further erred in holding that said United States Court for the Western District of the Indian Territory had jurisdiction to try this cause under section 6525 of Mansfield's Digest of Arkansas, under the Act of Congress of May 2,

1890 (26 Stat. L. 81), which said section is as follows:

> "If any person interested in the probate of any will shall appear within five years after the probate or rejection thereof, and by petition to the Circuit Court of the county in which such will was established or rejected, pray to have any such will rejected, if previously established, or proven, if previously rejected by the court of probate, it shall be the duty of the Circuit Court to direct an issue to try the validity of such will, which issue shall in all cases be tried by a jury."

Fifth. Said court erred in holding that section 31 of the Act of May 2, 1890 (26 Stat. L. 81), which puts in force certain general laws of the State of Arkansas at the close of the session of the General Assembly of that state of 1883, as published in 1884 in the volume known as Mansfield's Digest of the Statutes of Arkansas, was merely descriptive of the specific body of laws which Congress intended to become the laws of the Indian Territory, but that it was not the intention to make such adoption depend upon whether the laws described were actually in force in the State of Arkansas at the close of the session of the Legislature in 1883. That the interpretation so placed upon said statute is contrary to and in violation of and in contravention of said statute, and deprives the plaintiff in error of his property without due process of law, and deprives him of rights and privileges and immunities secured to

him by the Constitution and Laws of the United States.

Plaintiff in error says that said judgment of said Supreme Court of Oklahoma is repugnant to and in conflict with the laws of the United States, and especially section 31 of the Act of May 2, 1890 (26 Stat. L. 81).

Sixth. The court erred in holding that under the laws of the United States the Superior Court of Muskogee County had jurisdiction to cancel and set aside the will in question and particularly under the Act of May 2, 1890 (26 Stat. L. 81).

Seventh. In affirming the judgment of the Superior Court of Muskogee County which overruled the demurrer of the defendant to the third amended complaint of the plaintiffs.

BRIEF *of* ARGUMENT.

I.

This Case Presents for Consideration a Federal Question.

The Federal question presented in this case is the proper construction of section 31 of the Act of Congress of May 2nd, 1890 (26 St. L. 81). That section is as follows:

> "That certain general laws of the State of Arkansas in force at the close of the session of the general assembly of that state of eighteen hundred and eighty-three, as published in eighteen hundred and eighty-four, in the volume known as Mansfield's Digest of the Statutes of Arkansas, which are not locally inapplicable or in conflict with this act or with any law of Congress, relating to the subjects mentioned in this section, are hereby extended over and put in force in the Indian Territory until Congress shall otherwise provide, that is to say, the provisions of the said general statutes of Arkansas relating to administration, chapter one, and the United States Court in the Indian Territory herein referred to shall have and exercise the powers of courts of probate under said laws."

The question before the State Supreme Court was whether section 6525 of Mansfield's Digest of the Laws of Arkansas was put in force by the above act and whether sections 6509 and 6523 were adopted by said act, it being contended that they were locally in-

applicable, and therefore not adopted. This case was tried in the Supreme Court on the appeal from the overruling of a demurrer to the third amended petition in the lower court, and the decision of the lower court was affirmed without reference to the questions involved. *Gidney* v. *Chapple*, 43 Okla. 267. The same case had been previously before the State Supreme Court of Oklahoma, being an appeal from the sustaining of the same demurrer to the same complaint and the opinion of the court in this last case was made the opinion of the court in the case now before this court: *Chapple* v. *Gidney*, 38 Okla. 596.

Under the rule laid down by all courts, the law of the case was the original decision of the court which directed the lower court to reverse its finding and to make a finding in accordance with the decision of the appellate court. In fact, the Supreme Court of the State of Oklahoma, in a recent case not published—*Courtney* v. *Gibson*, No. 5361—held as follows:

> "*1.* All questions of law determined in a former appeal become the law of the case, both for the trial court and on appeal, where the evidence is substantially the same.
>
> "*2.* Where a case was tried before statehood in the Indian Territory, and carried by appeal to the appellate court of that Territory, in which appeal questions of law were determined, and the judgment reversed and the case remanded for a new trial, which was had after statehood, and substantially the same evidence was introduced as on the first trial; *Held*, that

the questions of law determined by the appellate court of the Indian Territory became the law of the case."

In passing on the propositions here raised the State Supreme Court, in *Chapple* v. *Gidney, supra,* said:

"The same process of reasoning, which we think is sound, applied to the case at bar, completely refutes the contention of counsel for defendant in error and inevitably leads to the conclusion that Congress did not intend that the test whether said laws were extended over the Indian Territory should be, were they in force in Arkansas at the date of the passage of the Act of May 2, 1890. We would say that the prudent lawyer, called upon to advise his client as to what laws of Arkansas were extended over and put in force in the Indian Territory by the Act of May 2nd, *supra,* sufficiently pursues his investigation to perform his whole duty towards his client, when he does so to the extent necessary to determine whether the laws of Congress relating to the subjects specifically described by subject and chapter number are published in the digest mentioned in the act, and that they are not locally inapplicable or in conflict with the Act of May 2nd or any law of Congress relating to the subjects specially mentioned. Having reached this conclusion, it follows tnat sections 6525 and 6526 were extended over and put in force in the Indian Territory by the Act of Congress of May 2nd, 1890, notwithstanding the decision of the Supreme Court of Arkansas to the effect that the Civil Code of Practice of that state repealed the last-named sections. *Dowell* v. *Tucker,* 46 Ark. 448."

A recent decision of this court relieves us of the necessity of making any argument upon this phase of the case, it having been distinctly held that the construction of the Act of Congress above set forth did present a federal question, it being in effect a question as to whether the sections above mentioned of Mansfield's Digest were adopted by the Federal Statute.

—*Perryman* v. *Woodward*, 238 U. S. 148, 59 L. ed. 1242.

II.

The Remedy in This Case Was Not Authorized by Any Law in Force at the Time of the Institution of This Suit.

It is clear that the original complaint (Rec., p. 15) was framed under and to comply with section 6525 of Mansfield's Digest of the laws of Arkansas, which section is as follows:

> "*Sec. 6525.* If any person interested in the probate of any will shall appear within five years after the probate or rejection thereof, and, by petition to the Circuit Court of the county in which such will was established or rejected, pray to have any such will rejected, if previously established, or proven, if previously rejected by the court of probate, it shall be the duty of the Circuit Court to direct an issue to try the validity of such will, which issue shall in all cases be tried by a jury."

The will in this case had previously been established before the United States Court sitting in probate in term time. This was done under section 6522 of Mansfield's Digest of the Laws of Arkansas, which is as follows:

> "*Sec. 6522.* When any will shall be exhibited for probate, the court of probate, or clerk thereof in vacation, in person or by his deputy, may and shall receive the probate thereof in common form, without summoning any party, and shall grant a certificate of probate, or, if the will be rejected, shall grant a certificate of rejection; but such action by such clerk or deputy, in vacation, shall be subject to the confirmation or rejection of the court. Rev. Stat., Chap. 157, Sec. 18; Civil Code, Sec. 513, subdivision 11; Act April 16, 1873."

All the laws touched upon in this case are found in Chapter 155 of Mansfield's Digest, which is mentioned in section 31 of the Act of Congress above quoted. Section 6525 was never extended over and put in force in the Indian Territory by said Act of Congress. Attention is called to the note made by Judge Mansfield to section 6525 on page 1240 of his Digest of the Laws of Arkansas, a notation made before the Supreme Court of Arkansas had passed upon the question. Soon thereafter, however, at the November 1885 term of the Supreme Court of Arkansas, that court squarely held that section 6525 had been repealed and was not in force in the State of Arkansas at the time the Act of Congress was enacted:

"The Civil Code of practice unquestionably provided for all cases in which sections 6525 and 6526 of Mansfield's Digest afforded any relief or remedy, and that being the case, repealed the last named sections."

—*Dowell* v. *Tucker*, 46 Ark. 438.

The Supreme Court of the State of Oklahoma, in passing on this question holding that section 6525 was in force and was available for this case, was clearly in error. Congress put Chapter 155 in force with the construction put on it by the highest court of the State of Arkansas, and the court had to look and see whether the laws contained in Mansfield's Digest were actually in force at the close of the session of the General Assembly of Arkansas in 1883. This court has settled both of these questions in accordance with our contention.

This court was considering this Act of Congress in a case involving different sections of Mansfield's Digest, and in *Perryman* v. *Woodward*, *supra*, it said, touching a ruling of the Supreme Court of Oklahoma similar to the one in this case:

"The state court held that this section was extended over the Indian Territory whether it was in force in Arkansas or not * * * an erroneous principle as decided in *Adkins* v. *Arnold*, 235 U. S. 417, 59 L. ed. 294."

In *Adkins* v. *Arnold*, *supra*, this court said:

"It is insisted that section 648 is inconsistent with section 4621 and should be treated as con-

trolling because its adoption by Congress was the later in time. Assuming that the two sections are inconsistent, as claimed, we think section 4621 is controlling. While both were embodied in the Arkansas compilation known as Mansfield's Digest of 1884, section 4621 was a later enactment than section 648, and superseded the latter in so far as they were in conflict. This was settled by the Supreme Court of the state before either section was put in force in the Indian Territory (*Bryan* v. *Winburn*, 43 Ark. 28; *Stone* v. *Stone*, 43 Ark. 160; *Criscoe* v. *Hambrick*, 47 Ark. 235, 1 S. W. 150), and we think Congress intended they should have the same force and meaning there that they had in Arkansas. See *Robinson* v. *Belt*, 187 U. S. 41, 47, 48, 47 L. ed. 65, 68, 69, 23 Sup. Ct. Rep. 16. Although put in force in the Indian Territory by different acts, they were not adopted as if they were unrelated, but as parts of a single system of laws whose relative operation, as determined by the Supreme Court of Arkansas, *had become an integral part* of them."

We think, therefore, that it is positively established that the Supreme Court of the state committed an error when it held that section 6525 of Mansfield's Digest was available to the original plaintiff in this case and was adopted and extended over Indian Territory by the Act of Congress under consideration. But the court further said that section 6523 of Mansfield's Digest was also available to the original plaintiff and was extended over the Indian Territory and was not locally inapplicable. That section is as follows:

> "*Sec. 6523.* Any person interested who, at the time of the final decision in the Circuit Court, resided out of this state, and was proceeded against by order of appearance only, without actual appearance or being personally served with process, and any other person interested who was not a party to the proceedings by actual appearance or being personally served with process, may, within three years after such final decision in the Circuit Court, by a bill in chancery, impeach the decision and have a re-trial of the question of probate; and either party shall be entitled to a jury for the trial thereof. An infant, not a party, shall not be barred of such proceedings in chancery until twelve months after attaining full age."

This contention has in it two fatal defects: *First.* If it was applicable the complaints filed by the plaintiff did not pretend to comply with it. *Second.* It could not have been complied with at all according to the contention of the plaintiff, and the same argument and method of reasoning used by the state Supreme Court in reaching the conclusion that section 6509 was locally inapplicable because not suited to the court machinery in existence at that time would inevitably reach the same result; that is, that section 6523 was equally inapplicable and incapable of adjustment to the existing United States Court in the Indian Territory.

Section 6523 provides for a re-trial of the issues and the opening up of the final judgment in the Circuit Court of the state after a trial by appeal

to that court from the probating of a will in the probate court. In other words, proceedings had to be had by appeal to the Circuit Court or to some court sitting as an appellate court, under section 6521 of Mansfield's Digest before you could pursue the remedy given under 6523. Section 6521 is as follows:

> "*Sec. 6521.* When the proceeding is taken to the Circuit Court, all necessary parties shall be brought before the court; and, upon the demand of any one of them, a jury shall be empaneled to try which or how much of any testamentary paper produced is or is not the last will of the testator. If no jury be demanded, the court shall determine that question, and the final decision given shall [illegible] bar to any other proceeding to call the probate or rejection of the will in question, subject to the right of appeal of writ of error to the Supreme Court, as hereinbefore named; but nothing in this section shall preclude a court of chancery from its jurisdiction to impeach such final decision for such reason as would give it jurisdiction over any other judgment at law."

The remedy provided was by a bill in chancery to impeach a judgment of the Circuit Court, which under section 6521 must be impeached "for such reason as would give it jurisdiction over any other judgment at law." A party who could proceed under section 6523 must be one who resided out of the state and who was proceeded against by order of appearance only, or any other person interested who was not a party to the proceedings by actual ap-

pearance or being personally served with process in the first trial on appeal in the Circuit Court.

In the original complaint (Rec., p. 15), drawn beyond a doubt under section 6525, it is stated in the first three lines that Sydney C. Chapple was a citizen of the United States and a resident of the Western District of the Indian Territory. Afterwards, on the 6th day of December, 1906, an amended complaint was filed (Rec., p. 33), making J. C. Scully a party, and in this they both allege that they are citizens of the United States and residents of the Western District of the Indian Territory. After statehood, and after the case was removed to the Superior Court of Muskogee County, a second amended complaint, so-called, was filed (Rec., p. 66) in which it is alleged that Chapple and Scully were both residents of Muskogee County, Oklahoma, formerly a part of the Western District of the Indian Territory under the laws of the United States. Only, in the third amended petition where Chapple alleges that he is a citizen and resident of Muskogee County, Oklahoma (Rec., p. 92), does he allege for the first time (Rec., p. 99) that he resided out of the Indian Territory at the time said will was probated and resided in the State of Missouri and was not personally served with process.

As Exhibit "C" to this third amended complaint is attached an amended complaint in the suit brought to set aside certain instruments of writing

connected with this case, in which it is stated plainly that at the time complaint was sworn to, to-wit: the seventh day of February, 1907, Chapple was a resident of the Western District of the Indian Territory. Had this case arisen in the State of Arkansas under the laws existing and in force in Mansfield's Digest of the laws of that state, before any proceeding could have been had under section 6523 the will must have been probated in a probate court and an appeal taken from the probate court to the law side of the Circuit Court, and there tried by a jury impaneled to try which or how much of any testamentary paper produced was or was not the last will of the testator, and if no jury was demanded the court could determine the question and render a final decision. From this final decision or verdict of the jury an appeal might have been taken to the Supreme Court of the state, or if a party was a non-resident of the state he might attack it and set it aside as provided in section 6523. In other words, it was a re-trial of an appellate proceeding. In any event, section 6523 either had to be strictly complied with, or if that was impossible it must be held locally inapplicable or in conflict with the law governing appeals enacted by Congress, and therefore not in force in the Indian Territory at the time this suit was instituted.

The jurisdiction of the probate side of the United States Court was entirely distinct from its

other jurisdiction. In probating the will in question the United States Court in the Indian Territory exercised the power of a court of probate. The chancery side, or equity side, of the United States Court though exercised by the same judge, was a separate and distinct court. The Act of Congress merely added to the United States Courts, which exercised much the same jurisdiction of separate probate courts, but in so doing did not bring probate law and equity into one system, but retained each system separate and distinct, although administered by the same judge. Hence, the proceeding in probating this will in the probate court was as distinct and separate from the court sitting in equity as if it had been exercised in a probate court in Arkansas. In a case arising in this jurisdiction before statehood, Judge CLAYTON said:

> "The fact that the United States Courts in the Indian Territory are vested with the powers both at law and in equity of Circuit and District Courts of the United States, and of the Circuit Court of Arkansas, makes no difference, because in the trial of this case it was sitting as a probate court, exercising only its probate powers, which are identical with those of the probate court of Arkansas."
>
> —*In re Frazee*, 64 S. W. 545.

As a matter of fact in cases of final orders of any kind the only remedy was an appeal from the or-

der of the probate court to the Court of Appeals for the Indian Territory.

—*Morrison* v. *Burnett*, 154 Fed. 617;
Laurell Oil & Gas Co. v. *Galbreath*, 165 Fed. 162.

As a matter of fact, the order admitting the will to probate was a final order. If so an appeal might have been taken direct to the Court of Appeals for the Indian Territory.

—*Hogane* v. *Hogane*, 57 Ark. 510.

The Act of 1890 provided that "said court in the Indian Territory shall exercise the powers of the probate court of Arkansas under this chapter." This referred to chapter 82 of Mansfield's Digest. In adopting chapter 155 there was also this provision: "Wherever any state laws of Arkansas or courts of record in said state are mentioned, said court in the Indian Territory shall be substituted therefor."

The will in this case was probated in open court, and needed no confirmation. In a case arising in Arkansas where the will was probated in common form, as the hearing was confirmed by the court no appeal was taken, but the parties there as here, sought another remedy and one different from the statutory remedy of appeal. The court held in two cases that appeal was the only method by which the will could be attacked.

—*Petty* v. *Ducker*, 51 Ark. 282;

Ouachita Baptist College v. *Scott*, 64 Ark. 349.

In the State of Georgia, where the court's system resembled much that in the State of Arkansas, the Supreme Court held as follows:

> "Where a will has been proved in common form the judgment of probate cannot be collaterally impeached in the Superior Court by any pleading attempting to raise the issue of *devisant vel non.*"
>
> —*Hooks* v. *Brown*, 53 S. E. 583.

Under section 6509, Mansfield's Digest of the Statutes of Arkansas, an appeal could be taken from the probating of a will from the court of probate to the Circuit Court, and then to the Supreme Court. The state Supreme Court held that this section was locally inapplicable because it was absurd to say that you could appeal from one side of the court to the other. To our mind, it is equally absurd to say that you could adjust and avail yourself of section 6523 when the whole procedure is based upon a re-trial of an issue that has been tried by the court or judge in the Circuit Court, or in some court from which an appeal has been taken, from the probate court. It is, however, perfectly clear that this suit was not instituted under that section, but under section 6525.

III.

The Court of Equity Had No Jurisdiction to Try This Case.

The proceeding provided for in section 6525, if it had been the law, was not on the chancery side of the Circuit Court of Arkansas and should not be, nor could the proceedings under section 6523 be on the chancery side of the federal courts of equity. It had been held in the lower courts of the Indian Territory once or twice that courts of chancery could exercise this jurisdiction under the general laws of the United States, but it seems that a very important case, decided by the Circuit Court of Appeals of the Eighth Circuit, had been overlooked.

It will be noted in that case that in the State of Arkansas a will was probated in common form by the clerk in vacation and subsequently confirmed by the court. From this judgment of the probate court one of the interested parties took an appeal to the Circuit Court, and, while this appeal was pending, it was sought to carry the case to the Circuit Court of the United States for the Eastern District of Arkansas. The case was taken up, in every phase, and the court decided that it could not be done. It held that such a proceeding was not an original proceeding, instituted in the Circuit Court, but was a continuation of the proceedings begun in the probate court. The court says:

"It is not a suit at law, nor is it a suit in equity, as understood either at common law or in equity, nor as recognized by the statutes and laws of the state."

—*Wahl* v. *Franz*, 100 Fed. 684.

This case further lays down the rule, well settled in all the states, that a will cannot be contested or attacked in a court of equity.

—*Broderick's Will*, 21 Wallace 503, 22 L. ed. 599;

Ewell v. *Tidwell*, 20 Ark. 142;

Dowell v. *Tucker*, 46 Ark. 438;

2 Pomeroy's Equity Jurisprudence, section 913.

There is a further reason, however, why a federal court of equity could not exercise such jurisdiction.

It is seen that in proceeding under section 6525, assuming for the sake of argument, that all these sections were legally in force in Arkansas and in the Indian Territory, a jury had to be impaneled to pass on the questions. Section 6523 was applicable only after proceedings under section 6521. Under section 6521, a jury is required, this being on the law side of the court, and the equity jurisdiction is only permitted "to impeach such final decision for such reason as would give it jurisdiction over any other judgment at law." In other words, section 6523 is a bill for a re-trial of a case tried under section 6521,

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but the re-trial is had just the same as it was originally had under section 6521. Under the Constitution of the United States, in any case where a party has a constitutional right to a trial by a jury, no person can take him into a court of equity, and, therefore, under no circumstances, could the United States Court for the Indian Territory, on its equity side, entertain this case, as the jury could not be so used in such a court as provided in the Arkansas statutes.

—*Indian Land & Trust Co.* v. *Shoenfelt*, 135 Fed. 484.

IV.

Neither the District Court of This State Nor the Superior Court Had Jurisdiction of This Case.

No matter where this case was in the United States Court when statehood intervened, it was a probate matter. It was a part of what originated in probate proceedings and it continued as a probate matter. If any further matter was necessary to be done touching the probation of the will, or to impeach it in any way, it had to be done in the County Court of Muskogee County, which was the successor of all the probate business of the United States Court sitting, prior to statehood, in Muskogee County. As stated in the petition in the original complaint, the subject matter of the suit was pending in the probate court of the Western District of

the Indian Territory. As was said by Judge ROGERS in the case of *Wahl* v. *Franz, supra*, where the probating of the will had been appealed to the Circuit Court:

> "It is not, therefore, an original proceeding instituted in the Circuit Court, but it is a continuation of the proceedings begun in the probate court."

Much more is that true in this case, because this case is merely an attack, and an illegal one, on the proceedings in the probate court.

It is contended that Congress conferred jurisdiction as to wills, etc., on the United States Courts, sitting in chancery, and not as a probate court, and that the same is true in respect to its power over guardians and in the exercise of its administrative functions as to guardians, administrators, etc. We have seen that this position is against the decisions of the federal courts, and it is absolutely in the teeth of the recognized decisions of the state Supreme Court. This latter court holds that the County Courts were the successors of all probate matters pending in the District Courts at the date of statehood.

—*Burdett* v. *Burdett*, 109 Pac. 922, 26 Okla. 416.

Article 7, section 9, of the Constitution of Oklahoma, provided for state District Courts which corresponded to the Circuit Courts of Arkansas, and

have the same jurisdiction on its civil side that the United States Court of the Indian Territory had, except in probate matters. Its jurisdiction is set out in section 10 of the same article of the Constitution of Oklahoma. Section 12 of article 7 of the Constitution sets out the jurisdiction of the County Courts created by the Constitution, to which is given all "original jurisdiction in all probate matters."

Congress by an act approved March 4, 1907, amending the enabling act of the State of Oklahoma (Vol. 34, Part 1, U. S. Stats., page 1286), being section 3 amending section 20 of the original act providing for the transfer of cases to such courts of the state as were successors of the United States Courts in the Indian Territory. It has been decided that civil cases, except probate cases, went to the state District Court, and that all probate matters went to the County Court.

—*Eaves* v. *Mullen*, 25 Okla. 679;
Gwinnup v. *Griffith*, 26 Okla. 866;
St. L. & S. F. Ry. v. *Cunlief*, 171 Fed. 319.

In 1909, two years after statehood, the State Legislature of Oklahoma created a Superior Court with the following jurisdiction:

> "Every such court shall have and exercise concurrent jurisdiction with the District Court in all proceedings, causes or matters, and concurrent jurisdiction with the County Court in all civil and criminal matters, except matters of probate."

Revised Laws of Oklahoma, 1910, section 1798. Under that law a case pending in the District Court could be transferred to the Superior Court and proceeded with as if it had been originally brought therein.

—*Ex parte Copeland*, 5 Okla. Cri. 551.

We see, therefore, that under the law that the District Court of the State of Oklahoma, which in certain matters was the successor to the United States Court in the Indian Territory, and to which this case was immediately transferred upon statehood, had jurisdiction in cases of appeals from the County Court of the state in probate matters, and could set aside wills when the proceedings in the County Court were brought before it on appeal.

—*Scott* v. *McGirth*, 41 Okla. 520.

It is alleged in the pleadings, and is admitted, that the subject matter of this suit was pending in the probate court of the United States Court of the Indian Territory, and it was therefore transferred with statehood to the County Court of Muskogee County, State of Oklahoma. If the decision in this case is affirmed, how does it get back to and control the action and proceedings of the County Court of Muskogee County, where the estate is being administered? Does the Superior Court send back an order undoing the former orders of the probate court by virtue of its appellate power, and as if this proceeding had been an appellate one, or must the de-

cree of the Superior Court be sent to the County Court as a decree in equity setting aside the probate of the will by a suit in equity, originally instituted in the United States Court on its equity side, and which, under no law then in existence, could be done, the United States Court on its equity side not having the power under the Constitution to give the relief sought in this proceeding by the original plaintiff? The whole contention is therefore resolved into an absurdity. This more clearly appears when we consider the contention raised by Exhibit "C" (Rec., p. 107), which is made a part of the third amended complaint on the ground that in that original suit the testamentary capacity of Mrs. Rawlings had been adjudicated and could not, therefore, be raised in this suit. It surely would not be contended by the plaintiffs that the will could have been set aside in a suit similar to that one, even if it had been sought to be done, and as no such relief was asked for, and as the court particularly found that it could not be given, it could not avail the plaintiff in this action. The court in rendering the decision in this case said:

> "That this cause was passed upon by this court when the said case was before it on another appeal, and that this court has nothing to do if it adheres to its former ruling and affirms the judgment of the court below."
>
> —*Gidney* v. *Chapple*, 43 Okla. 267.

The court then cites sustaining that, the original case, *Gidney* v. *Chapple et al.*, 26 Okla. 737, for what

reason we do not know, because in deciding that case it distinctly said:

> "As this suit does not attempt to set aside the will, but simply endeavors to restore Chapple where he was before the execution of the release and acquittance and to place matters in *statu quo* in order to enable Chapple to attack the will, it was therefore necessary for him to bring the consideration he had received into court as a condition precedent to the maintenance of this suit to set aside this release and acquittance. * * *
>
> That the court erroneously decreed, not only that the release and conveyance should be set aside and canceled, but that Gidney should execute to Chapple and Scully a reconveyance of all the property conveyed to him, and this in the face of the admitted fact that the suit to set aside the will was still pending, that the will could not be set aside in this action, and that the will was a valid instrument, and that Gidney took and owned this property under it until it was properly set aside by a court having jurisdiction to do so and in a trial for that purpose."

In that case, nothing was done or asked, tending to set aside the will, which was the purpose of this suit. Exhibit "C" was improperly attached to the complaint, and could not serve the plaintiffs nor the court any purpose in deciding this case, and could not affect one way or the other the proper determination of the demurrer to the third amended petition.

The United States Court for the Indian Territory clearly had no jurisdiction to set aside the probate of the will in this case in the proceeding instituted by the plaintiff, and as the District Court and the Superior Court simply acquired jurisdiction, if they acquired it at all, as its successors, stood in no better position so far as jurisdiction to determine the question was concerned, than did the United States Court. Each and all of the rulings of the state Supreme Court in regard to the application of the section of Mansfield's Digest mentioned and passed upon in its decision were wholly erroneous. The demurrer first filed to the third amended complaint in this case, and the same as is now presented, was considered and sustained after elaborate argument by an able judge, who was born, reared, educated and practiced law for a number of years in the State of Arkansas. The question being new and important, was given by him serious and intelligent consideration, and his decision on the first trial sustaining the demurrer, which he was afterwards compelled to reverse under the rulings of the state Supreme Court, was unquestionably correct, and we repectfully submit that this court must so find, and must, therefore, reverse the rulings and decision of the state Supreme Court.

Respectfully submitted,

WILLIAM T. HUTCHINGS,
Attorney for Samuel E. Gidney.

Office Supreme Court, U. S.
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FEB 28 1916
JAMES D. MAHER
CLERK

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No. 263

In the

Supreme Court of the United States.

October Term, 1915.

SAMUEL E. GIDNEY, - - - - *Plaintiff in Error,*

vs.

SYDNEY C. CHAPPLE and J. C. SCULLY, *et al.,*
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR, CHAPPLE AND SCULLY.

NAPOLEON B. MAXEY,
CHAS. F. RUNYAN,
Attorneys for Defendants in Error.

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BRIEF *and* ARGUMENT.

The statement of the case by plaintiff in error in his brief is a fair one, except that in the Assignments of Error, section 6523 of Mansfield's Digest of the Laws of Arkansas, is incorrectly quoted—probably through inadvertence.

Plaintiff in error in his brief at page 11, makes the erroneous statement that the question before the

State Supreme Court was "whether sections 6509 and 6523 were adopted by said act, it being contended that they were locally inapplicable, and therefore not adopted." Defendants in error made no such contention, but, on the contrary, maintained that they could bring their action under either section 6523 or section 6525, and the state court held with us, as a matter of law, that although section 6509 was not put in force because locally inapplicable, yet that section 6523 was available, as well as section 6525. We copy a portion of the court's opinion, as follows:

> "So we take it the first proposition turns upon whether section 6509, *supra*, was locally inapplicable to conditions in the Indian Territory or in conflict with the Act of May 2, 1890, or with any law of Congress relating to the subject of wills and testaments. A glance at the Statutes of Arkansas heretofore cited will disclose important differences between the judicial systems of the two jurisdictions. In Arkansas the courts having jurisdiction over wills and testaments are the courts of probate, the Circuit Courts, and the Supreme Court; the jurisdiction of the two latter courts being appellate. In the Indian Territory there was but one court of original jurisdiction, the United States Court of the Indian Territory, and it was provided that that court 'shall have and exercise the powers of courts of probate.' If any section of the laws extended to and put in force in the Indian Territory by the Act of May 2, 1890, could be construed as providing for an appeal from the action of the court in the matter of the probate of a will, it would be tantamount to holding that Congress intended

that an appeal should be taken from the action of the United States Court to the United States Court, which court was always presided over by the same judge, whether exercising its powers as a court of probate or the general jurisdiction of a trial court conferred upon it by the Act of Congress. To our minds this is a manifest absurdity. It is also apparent that it was not intended that such an appeal would lie to the Court of Appeals for the Indian Territory, the regularly constituted appellate court for that jurisdiction. Section 6521, c. 155, provides that: 'When the proceeding is taken to the Circuit Court, all necessary parties shall be brought before the court; and, upon the demand of any one of them, a jury shall be impaneled to try which or how much of any testimentary paper produced is or is not the last will of the testator. If no jury be demanded, the court shall determine that question, and the final decision given shall be a bar to any other proceeding to call the probate or rejection of the will in question, subject to the right of appeal or writ of error to the Supreme Court. * * *' There is no provision made by Act of Congress or otherwise for trial by jury in the Court of Appeals for the Indian Territory, and otherwise it was not equipped for the trial of causes *de novo*. Its jurisdiction was purely appellate, and it in no sense corresponded in jurisdiction or purpose with the Circuit Courts of Arkansas.

"Another significant circumstance which lends support to the conclusion we have reached, is that there was no mode of procedure in such matters provided for in the Indian Territory. The procedure for an appeal from the action of a court of probate to the Circuit Court under the laws of Arkansas is embodied in chapter 43 of

Mansfield's Digest, the chapter pertaining to County Courts, and that chapter was not extended to and put in force in the Indian Territory by the Act of May 2, 1890, or any other Act of Congress, and therefore the plaintiffs would be without any system of procedure to take an appeal if it was held that the section of Mansfield's Digest providing for an appeal from the court of probate to the Circuit Court was locally applicable.

"In *Hogane* v. *Hogane*, 57 Ark. 508, 22 S. W. 167, it was said that a court cannot exercise appellate jurisdiction over its own orders. Whilst such a proceeding would be possible, where the legislative intent to that effect is clear, it would be so out of the ordinary and such a vain and useless thing that we would not attribute such an intention to the legislative department unless the language used was incapable of any other reasonable interpretation. Therefore we hold that section 6509, *supra*, was locally inapplicable and was not extended to and put in force in the Indian Territory by the Act of Congress of May 2, 1890. From what we have said, it follows that the United States Court for the Western District had jurisdiction under section 6523, *supra*, which provides: 'Any person interested who, at the time of the final decision in the Circuit Court, resided out of this state, and was proceeded against by order of appearance only, without actual appearance or being personally served with process, and any other person interested who was not a party to the proceedings by actual appearance or being personally served with process, may, within three years after such final decision in the Circuit Court, by a bill in chancery, impeach the decision and have a retrial of the question of pro-

bate; and either party shall be entitled to a jury for the trial thereof. An infant, not a party, shall not be barred of such proceedings in chancery until twelve months after attaining full age."

I.

Jurisdiction of the Trial Court to Entertain the Action.

The United States Court in the Indian Territory was established in March, 1889 (Act of Mch. 1, 1889, Ch. 333, 25 Stat. L. 783). It was given certain limited jurisdiction among citizens of the United States who were citizens of the Indian Territory. Thereafterwards, on May 2, 1890, this jurisdiction was enlarged, and jurisdiction was given in all civil cases except where the tribal courts had exclusive jurisdiction. (Act of May 2, 1890, Chapter 182, 26 Stat. L. 81, entitled "An Act to Provide a Temporary Government for the Territory of Oklahoma, to Enlarge the Jurisdiction of the United States Court in the Indian Territory, and for other Purposes.") Section 31 of said act, making certain general laws of the State of Arkansas applicable to the Indian Territory, is as follows:

> "That certain general laws of the State of Arkansas in force at the close of the session of the General Assembly of that state of eighteen hundred and eighty-three, as published in eighteen hundred and eighty-four, in the volume known as Mansfield's Digest of the Statutes of

Arkansas, which are not locally inapplicable or in conflict with this act, or with any law of Congress, relating to the subjects specially mentioned in this section, are hereby extended over and put in force in the Indian Territory until Congress shall otherwise provide, that is to say, the provisions of the said general statutes of Arkansas relating to administration.

"Chapter one, and the United States Court in the Indian Territory herein referred to shall have and exercise the powers of courts of probate under said laws; to public administrators;

"Chapter two, and the United States marshal of the Indian Territory shall perform the duties imposed by said chapter on the sheriffs in said state;

"To arrest and bail, civil, chapter seven;

"To assignment for benefit of creditors, chapter eight;

"To attachments, chapter nine;

"To attorneys at law, chapter eleven;

"To bills of exchange and promissory notes, chapter fourteen.

"To civil rights, chapter eighteen;

"To common and statute law of England, chapter twenty;

"To contempts, chapter twenty-six;

"To municipal corporations, chapter twenty-nine, division one;

"To costs, chapter thirty;

"To descents and distribution, chapter forty-nine;

"To divorce, chapter fifty-two, and said court in the Indian Territory shall exercise the

powers of the Circuit Courts of Arkansas under this chapter;

"To dower, chapter fifty-two;

"To evidence, chapter fifty-nine;

"To execution, chapter sixty;

"To fees, chapter sixty-three;

"To forcible entry and detainer, chapter sixty-seven;

"To frauds, statute of, chapter sixty-eight;

"To fugitives from justice, chapter sixty-nine;

"To gaming contracts, chapter seventy;

"To guardians, curators, and wards, chapter seventy-three, and said court in the Indian Territory shall appoint guardians and curators;

"To habeas corpus, chapter seventy-four;

"To injunction, chapter eighty-one;

"To insane persons and drunkards, chapter eighty-two, and said court in Indian Territory shall exercise the powers of the Probate Courts of Arkansas under this chapter;

"To joint and several obligations and contracts, chapter eighty-seven;

"To judgments and decrees, chapter eighty-eight;

"To judgments summary, chapter eighty-nine;

"To jury, chapter ninety;

"To landlord and tenant, chapter ninety-two;

"To legal notices and advertisements, chapter ninety-four;

"To liens, chapter ninety-six;

"To limitations, chapter ninety-seven;

"To mandamus and prohibition, chapter one hundred;

"To marriage contracts, chapter one hundred and two;

"To marriages, chapter one hundred and three;

"To married women, chapter one hundred and four;

"To money and interest, chapter one hundred and nine;

"To mortgages, chapter one hundred and ten;

"To notaries public, chapter one hundred and eleven, and said court in the Indian Territory shall appoint notaries public under this chapter;

"To partition and sale of lands, chapter one hundred and fifteen;

"To pleadings and practice, chapter one hundred and nineteen;

"To recorders, chapter one hundred and twenty-six;

"To replevins, chapter one hundred and twenty-eight;

"To venue, change of, chapter one hundred and fifty-three;

"And to wills and testaments, chapter one hundred and fifty-five;

"And wherever in said laws of Arkansas the courts of record of said state are mentioned, the said court in the Indian Territory shall be substituted therefor; and wherever the clerks of said courts are mentioned in said laws, the clerk

of said court in the Indian Territory and his deputies, respectively, shall be substituted therefor;

"And wherever the sheriff of the county is mentioned in said laws, the United States Marshal of the Indian Territory shall be substituted therefor, for the purpose, in each of the cases mentioned, of making said laws of Arkansas applicable to the Indian Territory. (26 Stat. L. 94.)"

Especial attention is called to the fact that chapter XLII, entitled "Courts of Probate," of Mansfield's Digest, and containing provisions for appeals to the Circuit Court in cases of probate of wills, is omitted, but that chapter 155, pertaining to wills, and also containing provisions with reference to the probate of wills, is adopted. The omission of the one and the adoption of the other by the Congress cannot be held to be accidental. Only certain sections of chapter 155 need be noticed in the determination of the issues raised in the case at bar, namely: Sections 6508, 6509, and 6518 to 6521, inclusive, and 6522 to 6526, inclusive. We copy in full as follows:

"PROVING WILLS AND CONTESTING THEIR PROBATE.

"*Sec. 6508.* The manner of proving wills and contesting their probate shall be as follows: Wills shall be proved before and admitted to record by the court of probate, *(h)* of the county of the testator's residence. If he had no known place of residence in this state, and land is devised, then in the county where the land, or the greater part thereof, lies. If no land is devised, then in the county where he died, or that where-

in his estate, or the greater part thereof, shall lie, or where there may be any debt or demand owing to him."

"*Sec. 6509.* An appeal shall lie from the court of probate to the Circuit Court, and thence to the Supreme Court, upon every order admitting a will to record or rejecting it. The appeal to the Circuit Court shall be taken within one year after rendering the order of probate, or rejection in the court of probate, and to the Supreme Court within one year after the final decision in the Circuit Court."

"PROBATE OF WILL BEFORE COURT, UPON NOTICE.

"*Sec. 6518.* A person offering, or intending to offer, to a court of probate a will for probate, may obtain from the clerk of such court process directed to the proper officer of any county, requiring him to summon any person interested in such probate to appear to the next term of such court, and show cause why the said will should not be admitted to record. Civil Code, Sec. 513."

"*Sec. 6519.* The court to which a will is offered for probate may cause all persons interested in the probate to be summoned to appear on a certain day."

"*Sec. 6520.* Any person interested in such probate may be summoned or proceeded against by order of appearance, and to any person so interested, who is an infant or of unsound mind, a guardian *ad litem* may be assigned as in other cases."

"*Sec. 6521.* When the proceeding is taken to the Circuit Court, all necessary parties shall be brought before the court; and, upon the de-

mand of any one of them, a jury shall be impaneled to try which or how much of any testamentary paper produced is or is not the last will of the testator. If no jury be demanded, the court shall determine that question, and the final decision given shall be a bar to any other proceeding to call the probate or rejection of the will in question, subject to the right of appeal or writ of error to the Supreme Court, as hereinbefore named; but nothing in this section shall preclude a court of chancery from its jurisdiction to impeach such final decision for such reason as would give it jurisdiction over any other judgment at law. Civil Code, Sec. 513."

"PROBATE OF WILL BEFORE COURT, OR CLERK IN VACATION, WITHOUT NOTICE.

"*Sec. 6522.* When any will shall be exhibited for probate, the court of probate, or clerk thereof in vacation, in person, or by his deputy, may and shall receive the probate thereof in common form, without summoning any party, and shall grant a certificate of probate, or, if the will be rejected, shall grant a certificate of rejection; but such action by such clerk or deputy, in vacation, shall be subject to the confirmation or rejection of the court. Rev. Stat., Chap. 157, Sec. 18; Civil Code, Sec. 513, subdivision 11; Act of April 16, 1873."

"BY WHOM AND WHEN A RE-TRIAL OF THE QUESTION OF PROBATE MAY BE HAD IN CHANCERY.

"*Sec. 6523.* Any person interested who, at the time of the final decision in the Circuit Court, resided out of this state, and was proceeded against by order of appearance only, without actual appearance, or being personally served with

process, *and any other person interested who was not a party to the proceedings by actual appearance, or being personally served with process, may, within three years after such final decision in the Circuit Court, by a bill in chancery, impeach the decision* and have a re-trial of the question of probate; and either party shall be entitled to a jury for the trial thereof. An infant, not a party, shall not be barred of such proceedings in chancery until twelve months after attaining full age."

"*Sec. 6524.* But no such proceeding in chancery for establishing or avoiding a will shall operate further than is necessary to the rights of such infant, non-resident or other party, or otherwise affect the rights of any other person interested in the probate. Civil Code, Sec. 513, subdivisions 12 and 13."

"*Sec. 6525.* If any person interested in the probate of any will shall appear within five years after the probate or rejection thereof, and, by petition to the Circuit Court of the county in which such will was established or rejected, pray to have any such will rejected, if previously established, or proven, if previously rejected by the court of probate, it shall be the duty of the Circuit Court to direct an issue to try the validity of such will, which issue shall in all cases be tried by a jury."

"*Sec. 6526.* If no person shall appear within the time aforesaid to contest the validity of any such will, the probate or rejection thereof shall be binding, saving to infants, married women, persons absent from the United States, or of unsound mind, a like period after their respective disabilities are removed. Rev. Stat., chapter 157, Secs. 32-34."

(A) ***The court had jurisdiction of this case under section 6523, supra.***

Under section 6522 of this chapter on wills, the plaintiff in error, Samuel E. Gidney, offered the purported will at issue in this cause for probate in common form before the United States Court for the Western District of the Indian Territory, at Muskogee, and the same was probated in common form on July 3, 1906, without notice to any of the parties interested therein. Thereafter, on the 18th day of August, 1906, the defendants in error filed their original complaint in said United States Court, asking for the cancellation of the said probate for the reasons as above alleged. This, the plaintiff in error claims, cannot be done, and that the said court acquired no jurisdiction of the said action, for the reason that it had been decided by the Supreme Court of the State of Arkansas, previous to the extension of their laws over the Indian Territory, that section 6523 does not authorize a court of equity to review the decision of the probate court on the probate of a will where there has been no appeal to the Circuit Court, and as there was no appeal from the attempted probate in this case, that a demurrer lies to the complaint. Defendants in error maintain that this position is not well taken, for the reason that there were no separate and distinct courts of probate and of chancery in the Indian Territory; that there was only one court, which not only exercised probate

powers, but chancery powers as well, and that it is an absurdity to say that it was necessary to take an appeal from William R. Lawrence, who probated the said will, sitting as a probate judge, to William R. Lawrence, as a chancellor, for the cancellation thereof, it being in one and the same court, and presided over by one and the same judge, and that therefore this construction of the laws of Arkansas did not affect our procedure, for the reason that it was locally inapplicable, and the Act of May 2, 1890, *supra*, specifically provided that the said laws of the State of Arkansas should govern the procedure in our courts, except where locally inapplicable.

Defendants in error further maintain that if it was necessary to perform such an absurdity, that is, to take such an appeal, that they were precluded from so doing for the reason that there was no mode of procedure on appeal in force in the Indian Territory; that such procedure for an appeal as contemplated by the Arkansas Statutes from the County Court to the Circuit Court, was embodied in Chapter 43 of said Mansfield's Digest, the chapter pertaining to County Courts, and that the said chapter was never in force in Indian Territory, it not being included in the Act of May 2, 1890, or by any other Act of Congress, and that therefore the defendants in error were without any system of procedure to take such an appeal; that no other portion of the laws in force in the Indian Territory provided a system for such an appeal, and if this court should de-

cide that such an appeal was necessary, that then, in that event, the proceeding should be treated as an appeal, otherwise the defendants in error would be absolutely without remedy, no procedure having been given them by which an appeal could be taken.

Considering this section, in the light of the time of its adoption with the attendant circumstances, and the further fact that the Statutes on Appeal were not adopted, all judicial construction of this section by the courts of Arkansas—with reference to the necessity of appeal—loses its value as authority. The section must of necessity be considered independent of the restrictions imposed by past construction—rendered under wholly different conditions.

But in any event the State Supreme Court held that the action could be maintained under this Section, which construction should be held by this Honorable Court upon writ of error as not reviewable as it involves a local law only and the decision of the State Court is binding. Such is the holding of this court in the case of *Perryman* v. *Woodward*, 238 U. S., 148, 59 L. C. ed., p. 1244. Mr. Justice Holmes, speaking for the court, there says:

> "The state court held that this section was extended over the Indian Territory, whether it was in force in Arkansas or not, an erroneous principle, as decided in *Adkins* v. *Arnold*, 235 U. S. 417, *ante*, 294, 35 Sup. Ct. Rep. 118; but if the section was in force in Arkansas the decision may be right in its result. Whether the section was

in force is the main question in the case; and as this is, in effect, a question whether the act of congress adopted it, it may, without much stretching, be regarded as open to review in this court, *although if it were one degree more remote, and concerned the construction of an Arkansas act admitted to be in force, it would be treated as involving only a local law.* See *Shulthis* v. *McDougal*, 225 U. S. 561, 571, 56 L. ed. 1205, 1211, 32 Sup. Ct. Rep. 704; *United States* v. *Pridgeon*, 153 U. S. 48, 53, 54, 38 L. ed. 631, 633, 634, 14 Sup. Ct. Rep. 746."

It is admitted by all parties that Section 6523 was in force in Arkansas and was extended over the Indian Territory by the Act of Congress, *supra* and was in force therein. The only controversy is as to the construction of the section and the decision of the state court thereon, under all of the authorities, is not reviewable here.

(B) *The court had jurisdiction under sections 6525 and 6526.*

Defendants in error further contend that the court has jurisdiction of the case under Sections 6525 and 6526, Mansfield's Digest. It is contended by plaintiff in error that under the construction of the Supreme Court of Arkansas, these sections were not in force in that jurisdiction at the time the laws, as embodied in Mansfield's Digest were made applicable to Indian Territory. The cases of *Tobin* v. *Jenkins*, 29 Ark. 152; and *Jenkins* v. *Tobin*, 31 Ark.

307; and *Mitchell* v. *Rogers,* 40 Ark. 94, seem to have held to the contrary, although the decisions are not clear upon the subject and these decisions were all rendered prior to the printing of the laws in the volume designated as Mansfield's Digest, and while in the later case of *Dowell* v. *Tucker,* 46 Ark. 438, it was held that these sections were not in force, yet this decision was rendered at the November, 1885, term of the Arkansas Supreme Court, after the printing of the volume, and could not therefore be said to be a controlling authority in view of the peculiar language of Section 31, Act of May 2, 1890, *supra.*

See also the foot note to these sections in the Digest itself, appended by the Digester, which is illuminating. We quote footnote as follows:

> "Sections 6525, 6526, have given the digester and the examiner considerable embarrassment. Are they in force? The remedies of parties wishing to contest the probate of a will given by the Civil Code seem to cover the whole ground. But in *Tobin* v. *Jenkins,* 29-152, the petition was filed under section 6525, after the Code went into effect. The question was not raised, however, as to whether the section had been repealed by the Code, nor was it noticed by the court. However, the case was reversed, and sent down with instructions to the court below to 'make up an issue *devisavit vel non* to be tried by a jury.' When the same case came before the court on a second appeal *(Jenkins* v. *Tobin,* 31-307), the question of the repeal of the statute was raised; and the court mentioned the

fact that, though the proceeding was commenced after the Code went into effect, yet, that, as the will was probated before that time, the contestants had a right to proceed under Section 6525, and the court then said that the question had been decided on the previous appeal. As it is obvious that there can be no vested right in a civil remedy, the ground of this ruling is not very apparent. In *Mitchell* v. *Rogers*, 40-94, the question was alluded to again, though not directly involved in the case, and mention was made of the fact that it is now still further complicated by the clause of the constitution of 1874 giving exclusive original jurisdiction in the probate of wills to the probate court; but the court expressly declined to pass on the question as to whether these sections remain in force. They are here taken from Gould's Digest, having been omitted from Gantt's Digest, doubtless by reason of a conviction that they had been repealed by the Civil Code."

The case of *Dowell* v. *Tucker*, *supra*, is also not binding because it was based upon a construction of the constitution of the State of Arkansas of 1874. We quote therefrom as follows:

"The Circuit Court was vested with jurisdiction in all matters pertaining to the probate of wills at the time the constitution of 1874 was adopted. By that constitution probate courts were re-created and vested with 'such exclusive original jurisdiction in matters relative to the probate of wills, the estates of deceased persons, executors, administrators, guardians and persons of unsound mind, and their estates, as was then vested in the circuit courts, or might be thereafter prescribed by law.'

"It must follow, then, that under the constitution of 1874, the circuit court has not and cannot take original jurisdiction in any matter relative to the probate of wills."

It was held by this court, in *Perryman* v. *Woodward*, 238 U. S. 148, 59 L. C. ed. p. 1242, as follows:

"The Constitution of 1874 (Art. 9, Ch. 6) gives the occupation of the homestead of the deceased to his widow for life. The minor children take half during minority, but there were no minor children in this case. This section was held to be paramount, so far as it goes, in *Winters* v. *Davis*, 51 Ark. 335, 11 S. W. 420. But neither the Constitution of Arkansas nor the section of Mansfield's Digest dealing with the devolution of homesteads was put in force in the Indian Territory, so we are concerned only with section 3 of chapter 1 of the adopted laws. So far as it bears upon the present case we see no reason to doubt that it was in force, its displacement as to homesteads not being material here."

If therefore the doctrine announced by this court in *Perryman* v. *Woodward* is to be followed, the case of *Dowell* v. *Tucker* is not controlling because it is based upon a construction of the Constitution of Arkansas which was never in force in the Indian Territory.

RESUME.

No case in Arkansas has decided that Section 6523 of Mansfield's Digest, under which this proceeding is had, was not in force in Arkansas; the courts

of Arkansas have only so held as to Sections 6525 and 6526, *Dowell* v. *Tucker*, 46 Ark. 438; and this was based upon a construction under the constitution of the State of Arkansas, which is not binding upon us because congress did not adopt that constitution—*Perryman* v. *Woodward*, *supra*.

An appeal to the United States Court from the probate of the will could not be taken under Section 1386 of Chapter 42 of Mansfield's Digest, by filing affidavit and giving bond, because, *(a)* such chapter was not adopted by Act of Congress; *(1)* *In re Delk*, 2 Ind. Ter. 572, Vol. 52, S. W. Rep. p. 62; *(2)* Language of the Act of May 2, 1890. *(b)* Because there was no Probate Court in the Indian Territory, but it was specifically provided in the Act of 1890, that, "Whenever in said laws of Arkansas the courts of record of said state are mentioned, the said courts in the Indian Territory shall be substituted therefor," and further, as the power to probate in the first instance was given the United States Court or Clerk in the Territory, the appeal would not have been from an independent tribunal, but would have been from the same tribunal to itself. *Hogane* v. *Hogane*, 57 Ark. 508. *(c)* Because chapter 42 of Mansfield's Digest refers to the aggrieved party, and therefore the party to the original proceeding, and could not apply to one not a party thereto.

The provisions of Mansfield's Digest for an appeal to the United Court are locally inapplicable; *(a)*

because there was no procedure provided and there was no probate court in existence, separate and distinct as in Arkansas; *(b)* because such an appeal would have been from one court to itself; *(c)* because there was no procedure provided for appeal under the conditions and with reference to the facts alleged, and the mode pursued was the only one that could be pursued if the probate in common form was to be contested at all; *(d)* because such a construction must be placed on the statute adopted as would give to the parties a remedy, and not such a construction as would deny a remedy or involve on absurdity; *(e)* that construction must be adopted which would suggest itself to the plain mind, and not artificial or strained constructions.

—*Ardmore Coal Company* v. *Bevil,* 61 Fed. Repts. 757.

Remedial Statutes.

Remedial statutes are to be liberally construed to accomplish their purpose, instead of being limited in their scope and effect. Lewis' Sutherland Statutory Construction, Chapters 336, 519 and 583.

> "Remedial Statutes must be construed with reference to the evils intended to be provided against and not enlarged to embrace other subjects in the contemplation of the legislature."
>
> —*Va. Coupon Cases,* 25 Fed. 666.

"A construction the most reasonable and the best suited to accomplish the general purpose of the statute will be applied to a Remedial Statute where the words are not clear or precise."

—*Sproul* v. *Lawrence*, 33 Ala. 674.

"A statute authorizing a court to open, reexamine and correct the accounts of a public officer is highly remedial and must be liberally construed."

—*White County* v. *Key*, 30 Ark. 603.

"A statute of a remedial nature should receive a liberal exposition."

—*Jackson* v. *Warren*, 32 Ill. 331.

"In the construction of Remedial Statutes it is a rule that the time within which an act is required to be done if not made essential by the expressed terms of the statute will not be treated as such."

—*Ryan* v. *Van Landingham*, 7 Ind. 416.

"Statutes should if possible be so construed as to accomplish the end which the legislature had in view and not so as to defeat it and Remedial Statutes must be liberally construed to advance the remedy for the mischief for the cure of which they were intended."

—*State* v. *Blair*, 32 Ind. 313.

"Acts of assembly relative to the administration of justice should be liberally construed for the attainment of that important object."

—*Mitchell* v. *Mitchell*, (Md.) 1 Gill. 66.

"In construing a statute conferring new jurisdiction and remedies all doubts are to be solved in favor of the tribunal exercising jurisdiction."

—*Kansas City ex rel. Drake* v. *Summerwell*, 58 Mo. App. 245.

"Acts regulating the principles of law so far as they are remedial in their character should be liberally construed."

—*Hoguet* v. *Wallace*, 28 N. J. Law 523.

"Statutes giving the right of appeal are always liberally construed in furtherance of justice and such an interpretation as will work a forfeiture of such right is not to be favored."

—*Pearson* v. *Lovejoy*, 53 Barb. 407.

"The courts are not bound to follow the exact grammatical construction of the language of a statute if by other methods it can be determined what the legislative body intended, the court will give such construction to the statute as it may find actually intended."

—*United States* v. *Cohn*, 2 Ind. Ty. 474, 52 S. W. Rep. p. 38.

(C) *Congress, by section 31 of Act of May 2, 1890, supra, conferred jurisdiction, as to wills, on United States Court sitting in chancery, and not as probate court.*

Such construction should be given the statutes in question as to give power and make effective that

which Congress intended should be. The court will not assume that Congress attempted to do a vain or useless thing. The fact that Congress did enact the statutes referred to, is of itself authority to sustain a construction favorable to jurisdiction in this matter, especially in view of the fact that if such construction is not placed thereon, the court will be entirely deprived of any jurisdiction in the matter and the defendants in error will be utterly without a remedy to correct that which they allege is the grossest fraud.

Congress by Section 31 of Act of May 2, 1890, *supra*, conferred jurisdiction as to Wills, on United States Courts sitting in chancery and not as Probate Court. The court will notice the peculiar language of the Act of May 2, 1890, *supra*, as follows: "That is to say, the provisions of the said general statutes of Arkansas relating to administration, Chapter 1 and the United States Court of the Indian Territory herein referred to, shall have the powers of courts of probate under said laws." And then further in the said section, Congress says: "To guardians, curators and wards, Chapter 73, and said court in the Indian Territory shall appoint guardians and curators." And further, "To insane persons and drunkards, Chapter 82, and said court in the Indian Territory shall exercise the powers of the probate courts of Arkansas under this chapter." And further, "And to wills and testaments, Chapter 155." Observe that Congress adopted certain titles and in connection therewith, gave to the United States Court the power

of courts of probate but it specially refused to adopt the chapter entitled, "Courts of Probate." It must be assumed that the Congress knew what it was doing, the conditions it was dealing with and especially that it had created no separate court of probate in the Territory. Judge ROGERS, of Arkansas, long a distinguished judge upon both State and Federal bench in Arkansas, was an active member of the committee that framed this legislation and, it is almost a certainty, knew that to omit the chapter on Courts of Probate and adopt the chapter on Wills would avoid the very question raised. In other words, by the wording of the act, Congress attempts to say that as to matters of administration, and insane persons and drunkards, the United States Court in the Indian Territory shall have the power of a Court of Probate and as to guardians, curators and wards and as to wills, the United States Court is not given the power of a court of probate but only the power conferred in Chapter 73 as to guardians, and Chapter 155 as to wills. In other words, the United States Court is never a general probate court, but by virtue of its general powers, a court of Law or Chancery exercising the jurisdiction specified in Chapters 73 and 155 as to wills.

One cannot say that Congress did not act with some point in view, or that it did not act intelligently. If it had intended that the United States Court should act as a Court of Probate as to wills and testaments, it could certainly have said so as easily

as it did delegate the powers of Courts of Probate over insane persons and matters of administration. It therefore appeals to us irresistibly that Congress specifically intended to say that as to wills and testaments, the United States Court should act in its general capacity as a Chancery Court, and that it had in view the complicated state of the law in Arkansas as to these matters and the view is the logical one in light of the fact that Chapters 42 and 43 as to probate and County Courts was not put in effect by this Act and therefore there was no method of appeal from the United States Court, sitting as a Probate Court, to itself sitting as a Chancery Court. And if Congress did intend that as to wills the United States Court should sit as a Court of Chancery, there was no necessity of indicating any system of procedure on appeal, because there was no appeal.

Error, if Any, is One of Form.

If there be any error in the procedure taken in this case, which is denied, the error is one of procedure or of form, either immaterial or correctible under the direction of the court upon terms, and the whole spirit and purpose of the Statutes of Arkansas adopted by Congress requires that such errors either be held for naught, or that they be corrected under the direction of the court. Mansfield's Digest, Sections 4914-15-16-17; Mansfield's Digest, Sections 4925-26-27-28; Mansfield's Digest, Section 5083; Mansfield's Digest,

Section 5080; Mansfield's Digest, Section 315; Mansfield's Digest, Section 5086; Mansfield's Digest, Section 5084.

"Under Sections 4925 and 4929, Mansfield's Digest, an action is not abated or dismissed by being brought on the wrong side of the docket and in the absence of a motion to transfer the cause to the proper docket the error is waived and the court should proceed with the cause in accordance with the principle set up in the pleadings."

—*Sparks* v. *Childers*, 2 Ind. Ty. 187; 47 Vol. S. W. Repts. p. 316.

"That an action at law has been brought in equity is no ground of demurrer, the error should be corrected by a motion to transfer to the proper docket."

—*Conger* v. *Cotten*, 37 Ark. 286;
Nevada Co. v. *Hicks*, 38 Ark. 557.

"The Circuit Court having power to try causes both at law and in equity it is not error to try a common law cause according to the equity principles or *vice versa* where no objection is made."

—*Harris* v. *Townsend*, 52 Ark. 411;
King v. *Caldwell*, 26 Ark. 405;
Ford v. *Ward*, 26 Ark. 360.

"The rule that if complainant has a plain and ample remedy at law his appeal must be dismissed, has been changed by the code so that if his appeal shows that he has a legal right he may have the action transferred to the proper docket."

—*Moss* v. *Adams*, 32 Ark. 562.

II.

The issue in this case, *viz.:* "testimentary capacity of decedent," had been finally determined in former case, and was *res adjudicata.*

As set out in the statement of facts in this brief, after the probate of the purported will by the said Samuel E. Gidney, he obtained from Sydney C. Chapple, one of the defendants in error herein and the only child and sole heir at law of the decedent, a release and acquittance, whereby the said Chapple attempted to quitclaim unto him all of his rights in the property of his said mother and renounced any claim upon the same together with the right of contest of the will, and before the will could be contested and this suit could be maintained to cancel the probate thereof, it was necessary to institute another action to cancel the release and acquittance, which was done by these defendants in error, filing an action in the United States Court for the Western District of the Indian Territory at Muskogee, entitled *Sydney C. Chapple and J. C. Scully, plaintiffs*, v. *Samuel E. Gidney, defendant*, No. 7040, on the docket of that court. The defendant regularly answered in said action and the same was referred to the Master in Chancery of the said United States Court and a great mass of testimony taken therein, the greater portion of which was upon the mental capacity of the decedent, the same covering several hundred pages of typewritten manuscript. The mental capacity of the testatrix was one

of the issues squarely raised by the pleadings in that action, and was contested by the defendant. The greater portion of the testimony taken in that case by both parties was upon this issue, and in the findings made by the trial court, it was the main question involved, and decided by it, and the trial court, in one of its findings, decreed: "That the will executed by Sarah Rawlings on the 23rd day of October, 1905, in which she virtually disinherited her son, Sydney C. Chapple, and left her estate to the defendant, Samuel E Gidney, is void, for the reason that the said Sarah Rawlings did not have sufficient testamentary capacity at the time of executing the same to make a fair and intelligent disposition of her estate." The decree was regularly appealed from by the defendant and the Supreme Court of the State of Oklahoma in sustaining the same reiterated this finding and decreed that the said Sarah Rawlings did not have sufficient testamentary capacity to execute a valid will at the time of the execution of the one in controversy in this action. (110 Pac. Rep. p. 1099; 26 Okla. 737.) The defendants in error in the state court contended that this finding was *res adjudicata* as to that issue as between the parties hereto, and they set up in their supplemental complaint that therefore no further trial upon that fact need be had in this proceeding and that the trial court should proceed summarily upon such finding to decree that the said will is void, for the reason that the testatrix did not have testamentary capacity at the time of its execution

and therefore should cancel the probate thereof and set aside the same as prayed for in plaintiffs' complaint. The trial court sustained defendants in error in this view of the law and held in its decree (Rec. p. 128) that this issue was determined in the other suit between the parties and was therefore *res adjudicata* in the case at bar.

The authorities upon this proposition seem to be uniform, and to sustain the trial court thereon, and we quote from a few of them as follows:

> "The parties to a suit in which a question has been determined, cannot litigate the same question in another suit whether instituted before or after the suit in which the matter was determined, or in the same or another court."
>
> —*Sharon* v. *Hill*, 26 Fed. Rep. 337.

> "In a previous suit between the same parties, the title to the same strip of land was passed upon by the court. *Held*, that, although it was not strictly necessary for the court to have passed upon the question, it was now *res adjudicata;* the point having been distinctly raised by the pleadings, fully argued by counsel, and deliberately passed upon by the court."
>
> —*Almy* v. *Daniels*, (R. I.), 4 Atl. 754.

> "A right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies, even if that suit is for a different cause of action.

"An adjudication of a fact on which depends the title to lands in controversy is conclusive as between the parties, in respect to the title of other lands depending upon the existence or non-existence of that fact.

"A former judgment, if admissible in evidence, is conclusive of the matters in issue and actually determined by it, although it is not pleaded."

—*Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 24, 42 L. C. Ed. 355.

"A fact tried and determined by a court of competent jurisdiction, cannot be contested again between the same parties; and there is no difference in this respect between a verdict and judgment at common law and a decree of a court of equity."

—*The Bank of the United States* v. *Beverly et al.*, 1 Howard 134; 11 L. C. ed. 75.

"When a judgment in one action is offered in evidence in a subsequent action between the same parties upon a different demand, it operates as an estoppel only upon the matter actually at issue and determined in the original action; and such matter, when not disclosed by the pleadings, must be shown by extrinsic evidence."

—*Davis* v. *Brown*, 94 U. S. 423; 24 L. C. ed. 204.

The plaintiff in error contended that the two actions were not between the same parties, for the reason that although the plaintiffs are the same, that in this action to contest the will, there are additional defendants in this, that Charity Dobbs and Sullivan Thorn are also made defendants. There can be noth-

ing in this contention for the reason that they are the same plaintiffs in both cases and Samuel E. Gidney is one of the defendants in both cases and the making of the two additional defendants in this case is merely a matter of form for, while the matter in controversy is approximately of the value of thirty thousand dollars, yet the defendant, Charity Dobbs, is only entitled, under the will, to the sum of fifty dollars, and Sullivan Thorn, to the possession of old clothes of practically no value, so that to all intents and purposes, the parties in the two actions are identical, and even then, the courts have held that such a finding constitutes an estoppel. In the case of *Peterson* v. *Warner*, reported in 50 Pac. 1091, the court concludes as follows:

> "A judgment affirming the validity of a sale and transfer of property is conclusive upon the parties thereto, with respect to all the property covered by that entire transaction, although but part thereof was in fact the subject-matter of the issues in the case in which the judgment was rendered.
>
> "The fact that others were parties defendant to the record and bound by the judgment in that case does not make the same less conclusive upon the plaintiff in this case."

In the body of this opinion the court, in discussing the issues of *res adjudicata*, says further:

> "By a supplemental answer he pleaded the judgment in the first suit in bar of the second; alleging that the property was all transferred

at the same time, that the same transaction was involved in both cases (the same transfer of property), and that it had been tried and determined in the first suit in his favor, and against Jane Brakey. The Supreme Court held that the judgment was a bar, and was conclusive upon the parties. Now, can it make any difference in this case because a part of the property was real estate, and a part was personal property? Surely not. The fact that Mrs. Warner was made a party incidentally in the first suit, because of her present occupation of the land, makes no difference. She was not in any manner a party to the transaction, and had no interest whatever in it, unless it was a homestead interest in the land by reason of her occupation of it with her husband, which could only accrue to her in the event of the validity of the transfer. She was not a necessary party in the first suit, although it was proper to join her therein. Wells, Res. Adj., Section 19, p. 14; *Thompson* v. *Roberts*, 24 How. 241. In the case cited above, additional parties, both complainant and respondent, appeared upon the record. The court says: 'No good reason can be given why the parties in this case, who litigated the same question, should not be concluded by the decree, because others having an interest in the question of subject-matter were admitted by the practice of a Court of Chancery to assist on both sides. The question, as between the present parties, is *res adjudicata*, and none the less binding because others are concluded also. A contrary doctrine would sacrifice a wholesome principle of law to a mere technical rule, having no foundation in reason; making a distinction where there is no difference.' The demurrers to the fourth count of the answer and replies were properly

overruled. *Thompson* v. *Roberts, supra; Beloit* v. *Morgan*, 7 Wall. 619. This defense, being conclusive upon the parties, and decisive of the case, and being admitted to be true by the demurrer, fully sustained the judgment of the court, and it is affirmed. All the judges concurring."

The Court of Appeals of the State of New York seems to have gone further than in the cases above cited, in deciding this question in our favor. We quote from the case of *Castle et al.* v. *Noyes*, 14 N. Y. 329:

> "In an action to recover the possession of personal property, the plaintiffs' claim was founded upon a chattel mortgage, and the defendant's upon a sale by virtue of an execution against the mortgagor. The defendant sought to impeach the mortgage as fraudulent against creditors. The plaintiffs gave in evidence a former recovery in a suit wherein the defendant in this action had been plaintiff, and one R., a servant of the plaintiffs in this action, had been defendant. The former action was for trover and defendant justified the conversion under the present plaintiffs' mortgage, and judgment was rendered in favor of R., upon the ground that the plaintiff failed to prove the judgment on which the execution was isued. *Held*, that the judgment in the former suit was conclusive against the title of the defendant in this, whether the validity of the mortgage was determined in the former suit or not; and *Held, further*, that the present plaintiffs and R., their servant, are in such privity as to require the application of the rule laid down in *Doty* v. *Brown*, 4 N. Y. 71, that the judgment of a court of competent jurisdiction upon a question directly involved in the suit,

> is conclusive in a second suit between the same parties or their privies, depending on the same question, although the subject-matter of the second action is different."

This case seems to have been decided upon the authority of the case of *Doty* v. *Brown*, New York Court of Appeals, reported in 4 N. Y. 71; the court there holding that the judgment of a court of competent jurisdiction upon the question directly litigated, is conclusive in a second suit between the same parties as to the same question, though the subject-matter be different:

> "Parole proof is admissible in the second suit to show what was actually in controversy between the parties in the first suit and the grounds on which the judgment was rendered."
> —*Doty* v. *Brown*, 4 N. Y. 71.

In the case at bar, the defendants in error, in their supplement to their third amended complaint herein, have plead the existence of the suit and decree in the former action. They have set up all of the pleadings therein and the final decree of the court showing that the mental capacity of the testatrix was a point directly in issue, and, in fact, the main question litigated, for the reason that in order to set aside the release and acquittance executed, by the heir, to the defendant, it was necessary to show that he obtained the same, as a link in the chain of fraud and deception in obtaining the execution of the will, and

that he was quilty of fraud and deception in obtaining the execution of the will, because the testatrix was of such insufficient mental capacity as to be easily imposed upon by designing persons, and especially by one in whom she might have confidence, as in the defendant, because he was her legal adviser. If the court in the former case had found that the testatrix did have sufficient mental capacity to execute the will in question, then the whole case, upon the cancellation of the release, would have fallen and the entire structure built up by the defendants in error in that case would have collapsed, and it would not have been necessary to have maintained this action to cancel the will.

> "Where a question is distinctly put in issue, and tried and decided, the judgment operates as an estoppel as to that question in any subsequent suit between the same parties, whether the second suit be upon the same or some other cause of action.
>
> "When a question is distinctly put in issue, and tried and decided, the judgment operates as an estoppel as to that question in any subsequent suit between the same parties, whether the second suit be upon the same or upon some other cause of action. *Hopkins* v. *Lee*, 6 Wheat, 109; *Campbell* v. *Cross*, 39 Ind. 155-158; *Bank of the U. S.* v. *Beverly*, 1 How. 134-135; *Davis* v. *Brown*, 94 U. S. 423. So, when an issue is made in a case and decided, whether with or without trial, the judgment is conclusive between the same parties in any subsequent action for the same cause, and as to all questions which were or might have

been raised upon the first trial. *Stockton* v. *Ford*, 18 How. 418; *Mallony* v. *Horan*, 49 N. Y. 111."

—*Radford* v. *Folsom*, 3 Fed. Rep. 199.

"A judgment is an estoppel in an action between the parties thereto as to any fact or matter determined thereby."

—*Oregonian Ry. Co.* v. *Oregon Ry. & Nav. Co.*, 27 Fed. Rep. 278.

This question seems to have been fully discussed and correctly decided in the case of *Hanna* v. *Read*, reported in 102 Ill. p. 596.

From the syllabus:

"A decree of a court of competent jurisdiction in the State of Indiana, finding that a deceased grantor of lands was, at the time of making a conveyance of lands in that state, insane, and incapable of doing business, and setting such conveyance to his wife aside, is not only competent evidence to establish the fact of the grantor's insanity, in a suit between substantially the same parties, to avoid a conveyance of lands in this state, made by the same grantor and at the same time the deed was made to the Indiana lands, to a trustee, who immediately conveyed to the grantor's wife, but when properly pleaded and relied on, is conclusive upon the defendants in the latter suit, as to that fact.

"When the former adjudication is relied on as an answer and bar to the whole cause of action, or, in other words, when it is claimed to be an answer to all the questions involved in the subsequent action, then it must appear that the

cause of action and thing sought to be recovered are the same in both suits. The former adjudication in such case is known as an estoppel by judgment, and the judgment itself is a bar to the action.

"But when some specific fact or question has been adjudicated and determined in a former suit, and the same fact or question is again put in issue in a subsequent suit between the same parties, its determination in the former suit, if properly presented and relied on, will be held conclusive upon the parties in the latter suit, without regard to whether the cause of action is the same in both suits, or not. This is known as an estoppel by verdict, and is equally available to a plaintiff in support of his action, when the circumstances warrant it, as when offered by a defendant as matter of defense.

"It is sufficient to make a former adjudication as to any material fact determined an estoppel, that the parties be substantially the same. The fact that, in the second suit, one is made a party who was not a party in the first action, will not defeat the application of the rule of estoppel when such person is a mere formal party, having no interests that can be affected."

From body of opinion, page 603:

"The contention of defendants in error that, before an adjudication in a former suit can be made available as an estoppel, it must appear that the thing sought to be recovered and the cause of action in both suits are the same, is not universally true. A careful examination of the subject will show there is a diversity in the cases in this respect which, if kept in view, will satisfac-

torily explain what would otherwise appear to be irreconcilable statements of different courts of the highest respectability in discussing the law of estoppel by judgment or verdict. Where the former adjudication is relied on as an answer and bar to the whole cause of action, or, in other words, where it is claimed to be an answer to all the questions involved in the subsequent action, then it must appear as claimed by defendants in error, that the cause of action and thing sought to be recovered are the same in both suits. The former adjudication in cases of this class is technically known as an estoppel by judgment, and the judgment itself is commonly characterized as a bar to the action; but where some specific fact or question is again put in issue in a subsequent suit between the same parties, its determination in the former suit, if properly presented and relied on, will be held conclusive upon the parties in the latter suit, without regard to whether the cause of action is the same in both suits or not. This species of estoppel is known to the law as an estoppel by verdict, and is equally available to plaintiff in support of his action, when the circumstances warrant it, as when offered by a defendant as a matter of defense. The estoppel relied on in the present case clearly belongs to the class last considered, so it is unimportant whether the cause of action is the same in both cases or not. Although there is the diversity in the two classes of cases we have mentioned, it is apprehended there is no material difference in the principles by which they are governed.

"Whether the adjudication relied on as an estoppel goes to a single question, or all the questions involved in a cause, the fundamental prin-

ciple upon which it is allowed in either case, is that justice and public policy alike demand that a matter, whether consisting of one or many questions, which has been solemnly adjudicated by a court of competent jurisdiction, shall be deemed finally and conclusively settled in any subsequent litigation between the same parties, where the same question or questions arise, except where the litigation is a direct proceeding for the purpose of reversing or setting aside such adjudication. The foregoing view of the law on this subject is believed to be fully sustained by the following authorities: *Betts* v. *Starr*, 5 Conn. 550; *Parker* v. *Standish*, 3 Pick. 288; *Van Rensselaer* v. *Aiken*, 22 Wend. 549; *Aurora City* v. *West*, 7 Wall. 82; *Young* v. *Black*, 7 Chanch. 565; *Miller* v. *Maurice*, 6 Hill. 114; *White* v. *Coatsworth*, 2 Seldon, 137; *Eastman* v. *Cooper*, 15 Pick. 276; *Gardner* v. *Buckbee*, 3 Cow. 120; *Bouchaud* v. *Dias*, 3 Den. 243; *Hayes* v. *Gudykunst*, 1 Jones 221; *Cromwell* v. *County of Sac*, 94 U. S. (4 Otto), 526; *Davis* v. *Brown*, *Id.*, 423; *Duchess of Kingston's Case*, 2 Smith's L. C. 424; *Outram* v. *Morewood*, 3 East, 346; *Moonott* v. *Hampton*, 7 T. R. 269; *Arlin* v. *Parkin*, 2 Burr. 665."

The court there decides, and bases its position upon a great mass of authorities, that when some specific fact or question has been adjudicated in a former suit and the same is put in issue in a subsequent suit between the same parties, its determination in the former suit, if relied upon, will be held conclusive upon the parties in the latter suit, without regard to whether the cause of action is the same in both suits or not, and that the same may be re-

lied upon as a defense if raised in the answer, or it may be pleaded and relied upon by the plaintiff therein, and it is only necessary that the parties in the two suits be substantially the same, and the fact that in the second suit one is made a party who was not a party in the first action, will not defeat the application of the rule of estoppel when such person is a mere formal party, having no interest that can be affected.

This is exactly the case at bar. Here the parties in the two suits are substantially the same, and the additional parties are mere formal ones, having no interests that can be affected, for the reason that they practically had no interest to begin with, and those had been foreclosed by their failure to answer in this action after legal service had been made upon them, as shown. The specific fact as to whether or not the testatrix had mental capacity, was raised and adjudicated in the former action, and that adjudication is relied upon by the defendants in error in this action in their supplemental complaint, as they had a right to do under this decision, after properly pleading the same.

> "It is not necessary in pleading a former adjudication, to file a copy of the judgment.
>
> "Where a valid judgment exists, although there may have been errors in the proceedings, it may be pleaded as a former adjudication of the matters embraced in the issues in the action wherein it was rendered.

"Any of the parties to an action, between whom issues have been formed and determined, may, in a subsequent action, where the same issues are tendered, plead a former adjudication, as between them, although the parties to the different actions may not all be the same persons."

—*Davenport* v. *Barnett*, 51 Ind. 329.

In any event the trial court held that the issue was *res adjudicata* and this decree was affirmed by the State Supreme Court. (43 Oklahoma 267.) This finding, we maintain, is a matter of state practice and does not raise a Federal question, and even if the State Court erred upon the Federal question, yet its decree can be sustained upon this ground, as no writ of error has been lodged in this Honorable Court from the decree of the State Court in which this finding is made upon which defendants in error now rely as *res adjudicata*.

"The proper construction of state legislation being a question of local and not of Federal law, the decision of a state court thereon is not subject to review by the Federal Supreme Court on writ of error to that court."

—*Great Western Telegraph Co.* v. *Purdy*, 162 U. S. 329, 16 Sup. Ct. Rep. 810, 40 L. C. ed. p. 986;

Lombard v. *West Chicago Park*, 181 U. S. 33, 21 Sup. Ct. Rep. 507, 45 L. C. ed. p. 731;

Marshall v. *Ladd*, 131 U. S. LXXXIX appx., 19 L. C. ed. p. 153;

Harrison v. *Myer*, 92 U. S. 111, 23 L. C. ed. p. 606;

Stryker v. *Crane (Stryker* v. *Goodnow)*, 123 U. S. 527, 8 Sup. Ct. Rep. 203, 31 L. C. ed. p. 194.

III.

Contentions of Plaintiff in Error Not Well Taken.

Plaintiff in error, under subhead II of his brief, at page 22, maintains that the Act of Congress of May 2, 1890, merely added to the powers of the United States Court, and that the said court exercised separate jurisdiction, and did not bring the probate law and equity into one system, and that the court therefore did not have jurisdiction on its chancery docket to entertain this cause, and cited the case of *Laurel Oil and Gas Company* v. *Galbraith*, 165 Fed. 162. This case does not bear out his contention, and we desire to call the court's attention to paragraph 3 of the syllabus of this case, which reads as follows:

> "Proceedings in the United States Court in the exercise of the customary jurisdiction of probate courts are proceedings in equity. They are reviewable by appeal and not by writ of error, and no bill of exceptions is necessary to bring the evidence, affidavits and other proceedings therein upon the record, because they are no part of it."

This completely refutes their contention, that the chancery court did not have jurisdiction over a matter which would ordinarily arise in probate courts, *i. e.*, probate proceedings.

He further contends that an appeal was the only method by which the will in question could have been attacked in the State of Arkansas and cites the case of *Petty* v. *Ducker*, 51 Ark. p. 282. A careful reading of this case does not bear out their contention, for in that, it holds that the probate court, having taken jurisdiction to probate a will in common form without summoning any of the parties in interest, its judgment is not void and the same can be corrected only by appeal. We do not contest this proposition, and are not seeking to attack the probate of the will for any such reason. We contend simply that either Section 6523 or 6525, each or both of which are in force, gives the court of chancery, statutory power to certain persons therein named to have the probate inquired into. The case is therefore not in point.

He further cites the case of *Ouachita Baptist College* v. *Scott*, 64 Ark. 349. This case is not in point for the reason that the decision is reached because of the constitution of the State of Arkansas, and the court particularly says that its decision would have been otherwise if it had not been based upon a consideration of the constitution. This Honorable Court has heretofore held that the Act of Congress did not attempt to put in force the constitution of the State of Arkansas over Indian Territory, and therefore any decision of the Supreme Court of Arkansas, which was based upon a construction of the constitution would not be of any value as a precedent in the case at bar.

Plaintiff in error in his brief under sub-head III, at page 26 thereof quotes the case of *Wahl* v. *Franz*, 100 Fed. 684 as authority for his contention, that a court of chancery does not have jurisdiction to inquire into a probate of a will and that it is not a suit at law nor in equity as known either at common law or as recognized by the statutes and laws of the state. And while this case does seem to so hold, yet it has been particularly and clearly overruled by this Honorable Court in the case of *Gaines* v. *Fuentes*, 92 U. S. 20, 23 L. C. ed. 528.

In *Gaines* v. *Fuentes* the suit was commenced by petition in the parish court of New Orleans to annul a will probated years before, and to recall the decree by which it was established. That is the exact purpose of the appeal in the case in hand. Under the Code of Louisiana there was no suit in equity, and the supreme court divided upon the question whether or not the proceeding in that case fell within the term a "suit of a civil nature at law or in equity." The majority held that it did, that it was a suit in equity, and that the federal court had jurisdiction. The minority held that it was neither an action at law nor a suit in equity, and that the federal court was without jurisdiction. Mr. Justice FIELD, who delivered the opinion of the majority, said of that proceeding, what is equally true of the suit instituted in the state court by appeal in this case:

> "The suit in the parish court is not a suit to establish a will, but to annul it as a muniment of

title, and to limit the operation of the decree admitting it to probate. It is, in all essential particulars, a suit for equitable relief, to cancel an instrument alleged to be void, and to restrain the enforcement of a decree alleged to have been obtained upon false and insufficient testimony."

He further said:

"Whenever a controversy in a suit between such parties arises respecting the validity or construction of a will, or the enforcement of a decree admitting it to probate, there is no more reason why the federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between parties."

—*Gaines* v. *Fuentes*, 92 U. S. 22, 23 L. C. ed. 529.

He further contends that Section 6523 cannot be taken advantage of by defendants in error, for the reason that under section 6521 a trial by jury is required, and that as Section 6523 was applicable only after proceeding had under 6521, that a jury was therefore not available, and that, under the constitution of the United States, in no case where any party has a constitutional right to a trial by jury can a person take him into a court of equity, and therefore, under no circumstances, could the United States Court for the Indian Territory, on its equity side, entertain this case, as a jury could not be so used in such a court, as provided in the Arkansas statutes.

Whether or not this contention is correct, the State Court held against them, and this Honorable Court had repeatedly held that the right of a trial by jury having been passed upon by the state court, is not reviewable by the United States Supreme Court.

See the case of *Iowa C. R. Co.* v. *Iowa*, 160 U. S. p. 389, 16 Supreme Ct. Repts., p. 344, 40 L. C. ed. p. 467, and cases therein cited.

IV.

The Questions Raised Are Not Reviewable.

The defendants in error will further contend that this Honorable Court can not review the questions involved herein for various reasons.

(a)

The Federal right, title, privilege, or immunity must be set up or claimed in the trial court whenever, under the state practice, the highest state court, in reviewing the judgments of the trial court, refuses to consider questions not therein raised.

—*Baldwin* v. *Kansas*, 129 U. S. 52, 32 L. ed. 640 9 Sup. Ct. Rep. 193;

Spies v. *Illinois*, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21;

Brooks v. *Missouri*, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443;

Morrison v. *Watson*, 154 U. S. 111, 38 L. ed. 927, 14 Sup. Ct. Rep. 995;

Erie R. Co. v. *Purdy*, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605;

Layton v. *Missouri*, 187 U. S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137.

"The highest court of a state may decline to reopen, on a second appeal, a question of the validity of the service of summons, which it had upheld on the first appeal, without thereby making a case for a writ of error from the Supreme Court of the United States, where the claim that such service was invalid under the Federal Constitution was first set up on the second hearing in the trial court."

—*Western Electrical Supply Co.* v. *Abbeville Electric Light and Power Company*, 197 U. S. p. 299, 49 L. C. ed. 765.

The point we desire to make is, that plaintiff in error should have obtained a writ of error from the State Supreme Court from its first decision reversing the trial court and directing it to overrule the demurrer (38 Okla. 596) and not from the State Court's decision (43 Okla. 267), in which it holds that the questions were passed upon in the former appeal and therefore became the law of the case. This for the reason that there is clearly no error in the second decision and only, if any, in the first one and therefore this court has nothing to review.

(b)

It is obvious that in many cases the issue raised in the state court by the Federal question is not such

that its correct decision is essential to a proper disposition of the cause. Under such circumstances, it would be a work of supererogation for the Supreme Court of the United States to review the state court's judgment, since, even if it should find the Federal question to have been decided erroneously, and should reverse the judgment for that reason, the same judgment could be rendered by the state court on the other points in the case after correcting the error in deciding the Federal question. The Supreme Court of the United States, has, therefore, insisted that to give jurisdiction to review a judgment of a state court it is necessary that the decision of that court upon a Federal question be controlling in the disposition of the cause.

—*Citizens Bank* v. *Board of Liquidation*, 98 U. S. 140, 25 L. ed. 114;

Williams v. *Oliver*, 12 How. 111, 125, 13 L. ed. 915, 921.

Or, in other words, the decision of the Federal question must have been necessary to the determination of the cause.

—*Brown* v. *Atwell*, 92 U. S. 327, 23 L. ed. 511;

De Saussure v. *Gaillard*, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053;

Marrow v. *Brinkley*, 129 U. S. 178, 32 L. ed. 654, 9 Sup. Ct. Rep. 267;

Johnson v. *Risk*, 137 U. S. 300, 34 L. ed. 683, 11 Sup. Ct. Rep. 111;

Cook County v. *Calument & C. Canal & Dock*

Co., 138 U. S. 635, 34 L. ed. 1110, 11 Sup. Ct. Rep. 435;

Walter A. Wood Mowing & Reaping Mach. Co. v. *Skinner*, 139 U. S. 293, 35 L. ed. 193, 11 Sup. Ct. Rep. 528;

Eustis v. *Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131;

Snell v. *Chicago*, 152 U. S. 191, 38 L. ed. 408, 14 Sup. Ct. Rep. 489;

California Powder Works v. *Davis*, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350;

Missouri P. R. Co. v. *Fitzgerald*, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389;

Moore v. *Mississippi*, 21 Wall, 636, 22 L. ed. 653.

We have already seen that where the state court disposes of the case on non-Federal grounds, there is no room for the application of the principle of decision by necessary intendment to supply the state court's failure in terms to pass upon the Federal question. The doctrine now under discussion requires that, even where the state court has actually decided the Federal question, if there is besides another and distinct non-Federal ground of decision on which the judgment can be sustained, the Supreme Court of the United States will not entertain jurisdiction to review such judgment.

—*Rector* v. *Ashley*, 6 Wall. 142, 18 L. ed. 733;

Kennebec & P. R. Co. v. *Portland & K. R. Co.*, 14 Wall. 23, 20 L. ed. 850.

So, in the case at bar, even if the state court erred upon the Federal question, *viz.*, that section 6525 was available herein, yet the case can be affirmed upon the two questions which are not reviewable here, *viz.: (1)* The construction and therefore availability of Section 6523, and *(2)* That the decree in the former suit between the parties was *res adjudicata.*

In Conclusion.

The result in this case is of the sort "that makes the judicious grieve," and brings all laws and all courts into disrepute. A member of the legal profession, by fraud, induced a woman adjudged to lack testamentary capacity to disinherit her only child, and to make a will giving to him a considerable estate. For ten years he has possession of this estate, and conducts an expensive litigation in order to hold it. The issues are determined against him in the trial court and upon three appeals to the Supreme Court of the state, and in the face of issues and a judgment that should properly have the attention of Bar Associations and Grievance Committees, he refuses to relax his grasp upon property belonging to another, and persuaded the trial court, upon bare, bald, technical grounds, so attenuated that they cannot without effort, be understood, and without greater effort be stated in definite language, to hold that it was without jurisdiction and, in practical result, that the perpetrator of a gross fraud upon an incapable woman

shall retain the fruits of his malpractice. The Supreme Court of the State refused however to sanction this construction of the law and we cannot believe that this court will be patient with such a result, or with the professional effrontery that is neither abashed nor ashamed, but that rears its head with such bold audacity in utter disrepard of the decencies, not to say the ethics, of the professional relation.

Upon the whole we respectfully submit that the writ of error be dismissed and that the decision of the State Court be affirmed.

Respectfully submitted.

NAPOLEON B. MAXEY,
CHAS. F. RUNYAN,
Attorneys for Defendants in Error.